NO. 101733-2

SUPREME COURT OF THE STATE OF WASHINGTON

JULIA A. BARNETT, M.D.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, WASHINGTON STATE PERSONNEL RESOURCES BOARD,

Respondents.

DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves a decision soundly within the discretion of the superior court, i.e., determining whether Julia Barnett met the required threshold showing for the superior court to issue a statutory writ or a constitutional writ. None of the factors in RAP 13.4(b) apply to this case, as the Court of Appeals' decision below does not contradict precedent from this Court or the Court of Appeals, and does not present a significant constitutional question or issue of substantial public interest.

Barnett[1] demonstrated poor judgment when treating several patients in the custody of the Department of Corrections (DOC), resulting in unnecessary and debilitating pain and distress for those patients. As a result, DOC terminated Barnett's employment as the agency's Facility Medical Director. Barnett appealed her termination to the Personnel Resources Board (Board), which upheld her termination. Disagreeing with

[1] Julia Barnett's medical license has been suspended, so we refer to her as Barnett, instead of Doctor Barnett.

the result, Barnett filed a petition for extraordinary writs (statutory and constitutional) in superior court.

The superior court properly declined to issue either of the writs based on the substantial records before it. Barnett appealed that decision, based solely on the issue that the superior court did not first order the entire administrative record. The Court of Appeals upheld the superior court's denial of both writs, specifically finding that the Board did not exercise a judicial function as required for a statutory writ and that it was within the court's broad discretion to deny the constitutional writ. This Court should deny review.

II. ISSUES PRESENTED

1. Did the Court of Appeals correctly determine that the Board does not perform a judicial function when it reviews discipline of a state employee?

2. Did the superior court properly deny Barnett's statutory and constitutional writs without ordering the production of the entire administrative record because she failed to meet the proper threshold showing for such writs?

3. Did the Court of Appeals properly rely on part of *State ex rel. Hood* when applying it in light of the

decisions in *Williams v. Seattle School District* and *Pierce County Sheriff v. Pierce County*?

4. Does a public employee have a remedy at law for an alleged unlawful termination before or after the Board upholds the termination on appeal?

III. COUNTERSTATEMENT OF THE FACTS

A. Factual Background

Barnett was employed as Facility Medical Director at Monroe Correctional Complex with DOC, until her termination on April 18, 2019. CP 105. Before terminating her employment, DOC completed its standard protocols for an internal just cause investigation, which included notice to the employee of the intent to impose discipline and a pre-disciplinary meeting where she was given the opportunity to address the allegations. CP 115. Thereafter, the appointing authority determined there was just cause for her termination. CP 105-31. Barnett's termination was based on substantiated charges that she violated the DOC Health Plan, multiple DOC policies, and job expectations included in her position description and performance development plan, which resulted in unnecessary suffering and harm to six patients

during the period of January 16, 2018, through September 10, 2018. CP 105-31 (*see* CP 125 for the specific list of policies violated). All six patients referred to in the termination letter had serious medical issues, some of which were life threatening. CP 105-24.

DOC found that Barnett's actions or lack of action, caused needless suffering to her patients. CP 105-109. Additionally, DOC determined that termination was appropriate because Barnett failed to advocate for these patients and delayed emergency medical care that was essential to life and that caused significant deteriorations in patients' medical conditions. CP 130.

B. Procedural History

As a Washington Management Service (WMS) employee, Barnett was entitled to a hearing to review DOC's disciplinary decision before the Board, which has the authority to review state civil service employees' discipline. *See* RCW 41.06.170(2), (3). Barnett timely filed her appeal with the Board. CP 101-102. The Board conducted a three-day hearing on October 27-29, 2020.

CP 299. At the hearing, the Board received over 1,200 pages of exhibits and heard testimony from all witnesses offered by both parties. CP 299-317 (Findings of Fact, Conclusions of Law and Order of the Board.) The Board issued its decision almost a year later, on September 24, 2021, wherein it affirmed the disciplinary action taken by DOC. CP 299-317.

Barnett filed a Petition and Application for Writ of Review or for a Constitutional Writ of Certiorari (Petition) in Snohomish County Superior Court, naming both DOC and the Board as Respondents. CP 289-297. The Petition laid out a variety of errors allegedly committed by the Board. CP 289-297. Both Respondents filed responses opposing issuance of either writ. DOC's Response to Petition, CP 252-266, (supporting declaration CP 101-251); Board's Response in Opposition to Petition, CP 42-100. Ultimately, the superior court declined to issue either writ. Order Denying Writ, CP 6-7. In its decision, the superior court specifically stated that it made a complete review of all filings and found that the Board did not act illegally or

exceed its authority. CP 6-7. In addition, the court found that Barnett had other remedies at law available. CP 6-7.

Barnett sought direct review of the superior court's order by the Supreme Court under RAP 4.2(a)(4). *See* Statement of Grounds for Direct Review. The Supreme Court declined direct review and transferred the case to the Court of Appeals Division I. *Wash. State Dep't of Corr. v. Barnett*, ___ Wn.App.2d ___, 522 P.3d 52, (Wash. Ct. App. Div. 1, 2022). In her opening brief, Barnett stated that she "appeals on the sole issue of whether the record is required for a writ review of [the Board's] action." Barnett's Opening Brief at 2; *see also*, *Barnett* 522 P.3d at 56. Barnett's only assignment of error was that the trial court "failed to require the agency to first produce its record" before determining whether writ relief was warranted. Opening Brief at 8. The Court of Appeals upheld the superior court's denial of either writ in a published decision. *Barnett*, 522 P.3d at 52. The Court of Appeals specifically found that the Board did not exercise a judicial function as required for a statutory writ. *Id*. at

56-57. The Court of Appeals further explained that "there is no authority holding that a superior court must receive and review the entire record or hold a hearing before assessing the preliminary aspects of either writ." *Id*. at 54. Finally, the Court of Appeals determined that the superior court did not abuse its discretion in finding there were other legal options available. *Id*. at 58. The Court also concluded that the "'law is well established that discretion can be exercised when *no other adequate remedy at law* is available and when the decision below is arbitrary, capricious, or contrary to law.'" *Id.* at 58 (quoting *Torrance v. King Cnty.*, 136 Wn.2d 783, 787-88, 966 P.2d 891 (1998)).

IV. REASONS THE COURT SHOULD DENY REVIEW

This Court should deny Barnett's Petition for Discretionary Review because none of the factors in RAP 13.4(b) apply to this case. The Court of Appeals' decision below does not contradict precedent from this Court or the Court of Appeals and does not present a significant constitutional question or issue of substantial public interest. The sole issue Barnett appealed was

the superior court's failure to first obtain the entire administrative record of the Board before determining if a statutory writ or constitutional writ should be issued, and the Court should reject Barnett's attempt to introduce new issues on appeal at this late stage.

A. Review Should Be Denied Because the Court of Appeals' Decision Is Consistent with Well Settled Law That Employment Discipline Reviewed by the Board Is Not a Judicial Function

A statutory writ is an extraordinary remedy granted by statute, which should be used sparingly. *City of Seattle v. Holifield*, 170 Wn.2d 230, 239-40, 240 P.3d 1162 (2010) (citations omitted). "Although the writ [of review] may be convenient, no authority supports its use as a matter of expediency." *Dep't of Lab. & Indus. v. Bd. of Indus. Ins. Appeals*, 186 Wn. App. 240, 246–47, 347 P.3d 63 (2015) (citations and internal quotations omitted).

RCW 7.16.040 provides the following requirements and exceptions for a statutory writ:

> A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has [1] exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or [2] to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

A superior court may grant a statutory writ of review only if the requirements in RCW 7.16.040 are satisfied. *Bd. of Indus. Ins. Appeals*, 186 Wn. App. at 245. To issue a writ of review the superior court must find: 1) the decision is from an inferior tribunal or board, 2) *exercising judicial functions*, 3) which has either exceeded its jurisdiction or acted illegally, *and* 4) there is no adequate remedy at law. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992) (emphasis added); *see* RCW 7.16.040. All four elements must be met. *Clark Cnty. PUD v. Wilkinson, et al*., 139 Wn.2d 840, 845, 991 P.2d 1161 (2000) (citations omitted).

Washington courts apply four factors to determine whether an administrative agency's action is nonjudicial: 1) a court could not have been charged with making the agency's decision; 2) courts have not historically determined personnel management questions; 3) the Board did not have to apply existing law to present facts to make its determination; and 4) the hearing more closely resembled the business of administrators than that of courts. *Raynes*, 118 Wn.2d at 244-45.

The Court of Appeals opinion holding that the Board was not exercising a judicial function is consistent with a long line of cases. *Barnett*, 522 P.3d at 56-57. For example, this Court held that "the function of the Board, in hearing and determining appeals from employees who have been dismissed for cause by their employing agency is nonjudical in nature." *State ex rel. Hood v Wash. Pers. Bd.*, 82 Wn.2d 396, 401, 511 P.2d 52 (1973) (overruled on other grounds by *Pierce Cnty. Sheriff v. Civ. Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 658 P.2d 648 (1983)); *accord*, *Jones v. Pers. Res. Bd.*, 134 Wn. App. 560, 572, 140 P.3d

636 (2006) (holding the hearing at the Board was essentially a personnel matter). *See also*, *Pierce Cnty. Sheriff*, 98 Wn.2d at 693 (acknowledging that *Hood* was "almost squarely on point" when determining that RCW 7.16.040 did not permit a decision of the Board to be appealed because the Board was not exercising a judicial function). Similarly, this Court has stated that personnel policy and management, including appeals from disciplinary action, are "essentially an administrative or executive function rather than a function historically or traditionally resting with the judicial branch of government." *Gogerty v. Dep't of Insts.*, 71 Wn.2d 1, 5, 426 P.2d 476 (1967).

In essence, in a disciplinary appeal, the Board steps into the shoes of the State as employer and is free to use its personnel expertise to affirm, modify, or reverse the discipline. *Dunaway v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 112, 115, 579 P.2d 362 (1978). "Any other approach would result in an inflexibility inconsistent with the orderly, swift and just disposition of merit system appeals." *Dunaway*, 90 Wn.2d at 115 (citing *State Pers.*

Comm'n v. Webb, 18 Ariz. App. 69, 500 P.2d 329 (1972)); WAC 357-52-170.

Nor is the nature of the hearing—i.e., witness testimony, presentation of evidence, etc.—dispositive. Rather, the fact that an administrative agency holds a hearing, takes testimony, resolves disputed questions of fact, and enters findings of fact and conclusions of law, does not make the agency's functions judicial rather than administrative. *Green v. Cowlitz Cnty. Civil Serv. Comm'n*, 19 Wn. App. 210, 215, 577 P.2d 141 (1978); *accord Jones*, 134 Wn. App. at 571.

By contrast, the only time the Board has been found to exercise a judicial function was in the context of a labor dispute, in an unfair labor practice complaint, since those decisions are common to the court. *Wash. Pub. Emps. Ass'n v. Wash. Pers. Res. Bd*., 91 Wn. App. 640, 959 P.2d 143 (1998). *See also* RCW 41.56.160(1) (an unfair labor practice complaint may be filed with the Public Employment Relations Commission (PERC) or in *superior court*.) The *Washington Public Employees*

Association case does not demonstrate a conflict in court decisions; instead, the court was addressing the Board's role in an unfair labor practice, not a discipline case.

Barnett relies on *Williams v. Seattle School District No. 1* and *Pierce County Sheriff,* in an attempt to show they are in conflict with *Hood* related to the Board's nonjudical function. Instead, in both cases, the discussion that "disapproved" of the holding in *Hood* related only to a constitutional writ under the courts' inherent power of review. *Williams v. Seattle Sch. Dist. No. 1,* 97 Wn.2d 215, 221, 643 P.2d 426 (1982); *Pierce Cnty. Sheriff* 98 Wn.2d at 693. *Williams* did not involve the Board at all and thus, unsurprisingly, did not hold that the Board acts in a judicial capacity.

In order to claim that the Board acted in a judicial capacity, Barnett asserts that her appeal to the Board was essentially a breach of contract claim. That is, that her employment contract terms, which she defines as DOC's statute, rules and regulations, were violated. Corrected Petition for Review at 14-15. However,

employment breach of contract claims may not be used to circumvent the civil service law. *Weber v. State, Dep't of Corr.*, 78 Wn. App. 607, 608, 898 P.2d 345 (1995). "In Washington, terms and conditions of public employment are controlled by statute, not by contract." *Id*. at 610 (footnote omitted), citing *Wash. Fed'n of State Emps. v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984); *Greig v. Metzler*, 33 Wn. App. 223, 653 P.2d 1346 (1982).

Here, the Board's decision was nonjudicial because a court could not have been charged with deciding whether DOC properly applied its policies and procedures in Barnett's dismissal review. *See Jones*, 134 Wn. App. at 571 (reasoning court could not have decided employee grievance where Board analyzed internal agency documents). As in *Jones*, the Board was tasked with evaluating the agency's personnel actions rather than DOC statutes or WACs. *Id.* Moreover, courts have not historically determined personnel management questions, such as whether DOC properly applied its policies and processes in

Barnett's termination appeal. *Barnett*, 522 P.3d at 56-57, citing *Gogerty*, 71 Wn.2d at 5.

> Prior to creation of the [PRB], state employees had no express employment rights which were within the power of the courts to protect. Personnel administration was left exclusively to the discretion of management. Thus, there were no functions which the courts had or even could have performed prior to the creation of the [PRB]

Id. at 56, quoting *Williams*, 97 Wn.2d at 221.

There is no support for review by this Court due to a conflict with Supreme Court or Court of Appeals opinions. Therefore, this Court should deny review.

B. Review is Not Warranted Under RAP 13.4(b) as This Court Has Already Established That *Hood* is Still Good Law

Barnett argues that review should be granted to consider the continued applicability of *Hood* after the intervening decisions in *Pierce County Sheriff* and *Williams*. Corrected Petition for Review at 20. But this Court has already concluded that *Hood* remains good law after those decisions. *Pierce Cnty. Sheriff*, 98 Wn.2d at 693 (citing *Hood*, 82 Wn.2d at 396; RCW

7.16.040); *Williams*, 97 Wn.2d at 221. Neither *Pierce County Sheriff* nor *Williams* changed the holding in *Hood* that the Board does not perform a judicial function. Further, both cases clarified what could be considered for a constitutional writ.

Williams did not undermine the Court's holding in *Hood* that the Board did not perform a judicial function because courts did not historically review government personnel decisions. *See Hood*, 82 Wn.2d at 401. What Barnett may have misunderstood as "disapproval" of *Hood* was the discussion in *Williams* of the requirements of the *constitutional* writ—which unlike the statutory writ does not require an agency to act in a judicial capacity. For purposes of the constitutional writ, *Williams* clarified that the two-step analysis in *Hood* involving review of both arbitrary and capricious actions as well as violations of "fundamental rights" was unnecessary. *Williams*, 97 Wn.2d at 221. Even then, *Williams* did not disapprove of *Hood*, stating, "[w]hile we do not disagree with the analysis in the above cited cases [*Hood* et al.] and concur in their result, we believe it is

misleading to consider our inherent review powers [pursuant to constitutional writ] as dependent on separate determinations…." *Id.*

Similarly, *Pierce County Sheriff* disproves Barnett's assertion that this Court needs to clarify the extent to which *Hood* is still good law. *Pierce County Sheriff* relied on *Hood* in concluding that a statutory writ was not available to review an employee's appeal of discipline by a civil service commission. *Pierce Cnty. Sheriff*, 98 Wn.2d at 693, (citing *Hood*, 82 Wn.2d at 396; RCW 7.16.040). As in *Williams*, the only disapproval of *Hood* was related to *Hood*'s limitation of constitutional writs to violations of certain fundamental rights. *Id*. at 693-94. The holding in *Hood* related to statutory writs under RCW 7.16.040 remains good law and in fact was reaffirmed by the *Pierce County Sheriff's* decision.

Therefore, there is no reason for this Court to accept review of this matter as none of the requirements of RAP 13.4(b) have been met.

C. The Court of Appeals Decision Regarding Constitutional Writs Applied Well Settled Law and Does Not Warrant This Court's Review

The Washington State Constitution recognizes the right to seek discretionary review of an administrative agency decision under the court's inherent constitutional power (also known as constitutional or common law certiorari). Const. art. IV, §§ 4, 6; *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn. 2d 756, 769, 261 P.3d 145 (2011); *accord Pierce Cnty. Sheriff,* 98 Wn.2d at 693-94 (constitutional certiorari is limited to a review of the record to determine whether the challenged decision or act was arbitrary and capricious or contrary to law).

Courts consider a constitutional writ of certiorari an "extraordinary remedy," available only when there is no other means of review of an agency decision. *Saldin Sec., Inc. v. Snohomish Cnty.*, 134 Wn.2d 288, 293, 949 P.2d 370 (1988). A constitutional writ does not issue as a matter of right. *Id*. The scope of the court's review for a constitutional writ is very narrow, and one who seeks to demonstrate that an action should

be reviewed under such a writ has a heavy burden. *Pierce Cnty. Sheriff,* 98 Wn.2d at 695.

The purpose of a constitutional writ is "to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." *Wilkinson*, 139 Wn.2d at 845-46 (quoting *Saldin Sec., Inc.,* 134 Wn.2d at 292). A court accepts review under the writ only *after* a plaintiff alleges facts that, if verified, establish that the agency's decision was arbitrary and capricious or illegal. *Vinson*, 172 Wn.2d at 769 (citations omitted); *Saldin Sec., Inc.*, 134 Wn.2d at 293 (constitutional certiorari should be granted if petitioner's allegations clearly demonstrate the agency action is illegal or arbitrary and capricious). The court's decision whether to accept review is entirely within the court's discretion. *Id*. (citing *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986)).

1. Barnett has an adequate remedy at law

In addition to the factors above, the law is well established that the court should only exercise its inherent discretion to grant a writ of certiorari when no other adequate remedy of law is available. *Torrance*, 136 Wn.2d at 787-88; *Saldin Sec., Inc.,* 134 Wn.2d at 294. Similarly, under RCW 7.16.040, the petitioner for a statutory writ must establish that there is ". . . no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." RCW 7.16.040.

Barnett claims that she could not file a wrongful discharge in violation of public policy based on the Court of Appeal's recent decision in *Suarez v. State*, 23 Wn. App. 2d 609, 517 P.3d 474 (2022), *review granted* 200 Wn.2d 1026, 523 P.3d 1186 (2023). It is unclear if Barnett's assertion is correct, as there are insufficient facts before this Court; a tort of wrongful discharge may apply if Barnett's claim is that DOC terminated Barnett because she exercised a legal right or privilege. *Smith v. Bates Tech. Coll.*, 139 Wn.2d 793, 807, 991 P.2d 1135 (2000) (citing

Gardner v. Loomis Armored, Inc. 128 Wn.2d. 931, 936, 913 P.2d 377 (1996) (other cites omitted)). The tort's purpose is "to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith,* 139 Wn.2d at 809; *Thompson v. St. Regis Paper Co.* 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (recognizing a wrongful discharge cause of action in tort if discharge contravenes public policy).

Barnett states that her appeal to the Board, and her petition for a writ, were based in part on a violation of her due process rights inherent in the statutes and regulations governing DOC, as well as her constitutional due process rights. Corrected Petition for Review at 16, 18. A state employee who may be removed only for cause has a right to due process before being terminated. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L. Ed. 2d 494 (1985). Barnett was subject to the state's civil service laws, and DOC had to have just cause to terminate her. RCW 41.06.170; WAC 357-40-010. This requirement gave Barnett a protected property interest in her

continued employment, requiring DOC to afford her due process before termination. *Loudermill,* 470 U.S. at 541. The Board addressed whether DOC provided due process, as part of just cause, when deciding Barnett's case. CP 73, 75. However, the Board's jurisdiction extends to dismissal cases only if the employee is "subject to the statutory jurisdiction of the [B]oard" and is "adversely [] affected by a violation of state civil service law." WAC 357-52-010.

However, when constitutional due process rights are violated, an employee may file a court action. *Jarvis v. Janney*, 876 F. Supp. 2d 1204, 1212 (E.D. Wash. 2012) ("It is well-settled that a public employee with a constitutionally-protected interest in his or her continued employment is entitled to due process prior to being terminated."); *see also Loudermill*, 470 U.S. at 538-39. To the extent Barnett had constitutional due process rights to her continued employment, she had an additional remedy at law: she also could have pursued a §1983 claim in court.

Barnett asserts that collateral estoppel prevents her from filing any further legal action. Corrected Petition for Review at 19. This argument is without merit because as discussed above, the Board did not act in a judicial capacity when deciding her case. Courts have ruled that if an administrative agency is acting in a judicial capacity and the parties have an adequate opportunity to litigate, "courts will apply preclusive effect to the agency's decisions." *Vargas v. State*, 116 Wn. App. 30, 37, 65 P.3d 330 (2003) (citing *Stevedoring Servs. v. Eggert,* 129 Wn.2d 17, 40, 914 P.2d 737 (1996) (citing *Texas Emps. Ins. Ass'n v. Jackson,* 862 F.2d 491, 501 (5th Cir.1988)); *State v. Dupard,* 93 Wn.2d 268, 274, 609 P.2d 961 (1980) (citing *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966)). However, where an agency's decision is administrative and *not* judicial in nature, courts do not apply preclusive effect to the agency's decision. *Id*. In *Vargas*, the court dealt with whether litigation at the Personnel Appeal Board (prior appeals board for state civil service employees) would

have a preclusive effect on the employer during litigation of a wrongful discharge claim. The Court of Appeals determined that the superior court did not err by refusing to apply collateral estoppel to the Personnel Appeal Board's decision. *Vargas*, 116 Wn. App. at 37.

Barnett's reliance on *Christensen v. Grant County Hospital District No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004), to argue collateral estoppel will prevent any additional litigation is misplaced. First, *Christensen* involved an unfair labor practice complaint in front of PERC. *Id*. at 303-304. The Union and Christensen claimed that Christensen was terminated for union activity. *Id*. As discussed above, unfair labor practice litigation is the type of administrative litigation that is judicial in nature. *Wash. Pub. Emps. Ass'n,* 91 Wn. App. at 649.

Second, Christensen sought to litigate, at the superior court, a tort of wrongful discharge in violation of public policy. This Court pointed out that the public policy that Christensen sought to vindicate in superior court was the same public policy

that PERC is empowered to enforce—the fair and appropriate collective bargaining between public employees and their employers, untainted by discrimination against union activists. *Christensen*, 152 Wn.2d at 315 (citing RCW 41.58.020, 41.56.140). Therefore, in *Christensen*, collateral estoppel did apply. *Id*. at 321. The same result would not occur in this case because the Board does not exercise a judicial function. *See id.* at 307–308 (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 107–08, 111 S.Ct. 2166, 115 L. Ed. 2d 96 (1991)).

This Court should not accept review of this matter as the Court of Appeals decision regarding constitutional writs applied well settled law and does not warrant this Court's review.

D. Well Settled Law Exists on When Public Employees Have Access To Courts for Review of Discipline Upheld by the Board and This Issue Does Not Warrant This Court's Review

It appears that Barnett now asks this Court to reconcile the Legislature's grant of review by statutory writ under RCW 7.16.040 with the Legislature's denial of appeal rights in another

statute, here RCW 41.06.170(2), which provides that the Board's decision shall be final and not subject to further appeal. Barnett did not brief this issue before the Court of Appeals and has not done so now. Accordingly, the Court of Appeals properly declined to address the issue. *Barnett*, 522 P.3d at 57 (citing *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990)).

Barnett relies on the Court's recent decision in *Martin v. Wash. State Dep't of Corr.*, 199 Wn.2d 557, 510 P.3d 321 (2022), to request review by this Court—claiming the issue is really access to courts. Such reliance is misplaced, as the issues in *Martin* are different from the issues in the case.

The *Martin* case addressed whether a statute was constitutional when it required the plaintiff to obtain a certificate of merit from a health care provider who qualifies as an expert before filing a medical malpractice suit against state agents. *Id*. at 559 (addressing RCW 7.70.150). Contrary to Barnett's argument, the Court's decision was not a blanket ruling that all matters should be allowed to go to court.

Unlike employee appeals of discipline, medical malpractice cases are traditionally filed directly in court. *Martin* does nothing to impact the requirements for review of the Court of Appeals' decision below, as it does not contradict precedent from this Court or the Court of Appeals, and does not present a significant constitutional question or issue of substantial public interest. Therefore review should be denied.

V. CONCLUSION

Because the Petitioner, Barnett, failed to demonstrate that review is warranted under RAP 13.4(b), this Court should deny review.

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RESPECTFULLY SUBMITTED this 30 day of March, 2023.

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CERTIFICATE OF SERVICE

I declare that I caused a copy of this document to be served on all parties or their counsel of record on the date below by electronic mail through the Court's e-filing system:

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

DATED this 30th day of March, 2023, at Olympia, WA.

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March 30, 2023 - 3:53 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,733-2
Appellate Court Case Title:	Julia A. Barnett v. Washington State Dept. of Corrections, et al.
Superior Court Case Number:	21-2-04973-1

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