

FILED
SUPREME COURT
STATE OF WASHINGTON
5/24/2023 2:31 PM
BY ERIN L. LENNON
CLERK

NO. 101831-2

SUPREME COURT OF THE STATE OF WASHINGTON

MARK ANDREW HIESTERMAN,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

**RESPONDENT'S ANSWER TO PETITION
FOR REVIEW**

ROBERT W. FERGUSON
Attorney General

TIMOTHY E. ALLEN
WSBA 29415
Assistant Attorney General
800 Fifth Avenue
Suite 2000
Seattle, WA 98104
206-464-7744
OID #91019

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUES.....	2
III.	COUNTERSTATEMENT OF THE CASE.....	3
	A. The Department’s Regulatory Role.....	3
	B. The Board Received Two Complaints Regarding Hiesterman, Which Ultimately Led to Disciplinary Action and Issuance of Press Releases.....	6
	C. The Board Reinstated Hiesterman’s License with Conditions, Which the Board Ultimately Removed	11
	D. Procedural History in the Trial Court.....	12
	E. Procedural History in the Court of Appeals	14
IV.	ARGUMENT WHY REVIEW SHOULD BE DENIED	15
	A. Hiesterman Fails to Establish Any of the RAP 13.4(b) Criteria.....	15
	B. This Case Does Not Present Any Significant Question of Constitutional Law.....	17
	1. Hiesterman’s challenge to RCW 18.130.300 does not present a significant constitutional question.....	17

2.	Heisterman’s challenge to <i>Janaszak</i> does not present a significant constitutional question	22
C.	Hiesterman Fails to Establish Conflict with any Published Decision	23
D.	The Court of Appeals Correctly Interpreted RCW 18.130.300(1).....	24
V.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Clark County</i> , 105 Wn.2d 675, 717 P.2d 274 (1986).....	23
<i>Beltran v. Santa Clara Cty.</i> , 514 F.3d 906 (9th Cir. 2008)	21
<i>Creelman v. Svenning</i> , 67 Wn.2d 882, 410 P.2d 606 (1966).....	21, 23
<i>Hiesterman v. Dep't. of Health</i> , 24 Wn. App. 2d 907, 524 P.3d 693 (2023).....	passim
<i>In Re Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011) (en banc).....	16
<i>Island County v. State</i> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	18
<i>Janaszak v. State</i> , 173 Wn. App. 703, 297 P.3d 723 (2013).....	passim
<i>Savage v. State</i> , 127 Wn.2d 434, 899 P.2d 1270 (1995).....	23, 24
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	18
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	21
<i>Wash. Water Jet Workers Ass'n v. Yarbrough</i> , 151 Wn.2d 470, 90 P.3d 42 (2004).....	20

Statutes

RCW 18.57.003 4

RCW 18.57.005 4

RCW 18.57.011 4

RCW 18.57.020 4

RCW 18.130.050 4

RCW 18.130.100(1) 13

RCW 18.130.110(2)(c)..... 5

RCW 18.130.170(1) 10

RCW 18.130.300 passim

RCW 18.130.300(1) passim

Other Authorities

Dep’t of Health, Provider Credential Search,
<https://fortress.wa.gov/doh/providercredentialsearch> (last
visited May 17, 2023) 12

Merriam-Webster’s Dictionary, [https://www.merriam-
webster.com](https://www.merriam-webster.com) (last visited May 16, 2023)..... 20

Rules

RAP 2.5(a) 18

RAP 2.5(a)(3) 17, 22

RAP 13.4 16
RAP 13.4(b)..... 1, 15, 16, 24
RAP 13.4(c)(7) 16

Constitutional Provisions

Const. art. I, § 8 14, 19, 20
Const. art. II, § 26..... 3, 14, 22

I. INTRODUCTION

Washington law expressly provides immunity for official acts related to disciplinary proceedings held by the Department of Health. RCW 18.130.300. Applying settled precedent, the Court of Appeals correctly interpreted RCW 18.130.300(1) and held that it applies to the legally required reporting at issue here, making the Department immune from suit based on the complained of conduct. The Court of Appeals also correctly declined to address two constitutional arguments that Hiesterman raised for the first time on appeal, concluding that neither was a manifest error affecting a constitutional right.

Hiesterman fails to establish any basis for review by this Court. He does not address, much less satisfy, any of the standards set forth in RAP 13.4(b). Nor could he. Neither of Hiesterman's unpreserved constitutional arguments present a significant constitutional question. Hiesterman's conclusory assertion that RCW 18.130.300 establishes an irrevocable immunity is insufficient and conflates an irrevocable immunity

with an absolute immunity. And Heisterman's argument that courts may not interpret statutes or the common law to extend immunity to governmental entities is contrary to substantial authority. The Court of Appeals correctly declined to consider these unpreserved arguments and, because there is no manifest error, there are no constitutional questions for this Court to review.

Similarly, Hiesterman does not identify any conflict between the Court of Appeals decision and any published decision. Hiesterman simply misreads this Court's precedent in suggesting otherwise.

This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals correctly conclude that Hiesterman failed to preserve his argument that RCW 18.130.300 violates article I, section 8 and failed to establish any manifest constitutional error when the statute creates an absolute, not an irrevocable, immunity?

2. Did the Court of Appeals correctly conclude that Hiesterman failed to preserve his argument that *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013), violates article II, section 26 and failed to establish any manifest constitutional error when the *Janaszak* court expressly considered that constitutional provision in determining that the immunity in RCW 18.130.300 extends to the Department and the State?

3. Did the Court of Appeals correctly conclude that, by its plain language, the immunity provided in RCW 18.130.300(1) for “other official acts performed in the course of their duties” applies to the Department’s reporting obligations at the conclusion of a disciplinary proceeding?

III. COUNTERSTATEMENT OF THE CASE

A. The Department’s Regulatory Role

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;¹ RCW 18.57.005 (powers and duties of the Board of Osteopathic Medicine and Surgery).

The Board of Osteopathic Medicine and Surgery (the Board) oversees the licensing and discipline of osteopathic physicians, such as Hiesterman. RCW 18.57.003, .005, .011, and .020. The Uniform Disciplinary Act (UDA) provides that the Board has the authority to receive and investigate complaints against health care providers. RCW 18.130.050; CP 107.

After the Board receives a complaint, the Board determines whether the complaint warrants additional investigation. CP 149. Following an investigation, the Board hears recommendations on possible actions from the Reviewing Board Member assigned to the case. CP 149. The Board then selects a course of action, which may include pursuing discipline through a formal Statement of

¹ 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.

Charges. CP 149. After issuing a Statement of Charges, the Board is required under the UDA to notify the public through a news release. RCW 18.130.110(2)(c).

If the matter proceeds to 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 is imposed and a final order is issued, the Board is again required under the UDA 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).

The UDA also includes an immunity provision that states, in relevant part, “The Secretary [of the Department], members of the board or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal, based on any disciplinary proceeding or other official acts performed in the course of their duties.” RCW 18.130.300(1).

B. The Board Received Two Complaints Regarding Hiesterman, Which Ultimately Led to Disciplinary Action and Issuance of Press Releases

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

The complaints were preceded by a June 2013 arrest for driving under the influence (DUI) in Idaho. CP 57. This was Hiesterman's second DUI arrest; his first occurred in Michigan in 2006. CP 57. After his arrest in Idaho, Hiesterman ultimately pled guilty to DUI in exchange for a withheld judgment, with the condition that the charges would be dismissed if he met certain community service and alcohol evaluation conditions. CP 58, 118-19. Ultimately, the charges were dismissed on May 13, 2014. CP 155, 163, 166.

Shortly after his Idaho DUI arrest, Hiesterman self-referred to the Washington Physician's Health Program

(WPHP), a voluntary substance abuse and support program for at-risk medical professionals. CP 59-60. Ultimately, Hiesterman underwent lengthy alcohol dependency evaluations through the Betty Ford Center in December 2013. CP 61. The Betty Ford Center recommended Hiesterman participate in a residential chemical dependency treatment program and concluded that Hiesterman should not practice medicine until he successfully completed treatment. CP 64-65. Hiesterman did not agree with this assessment, nor did he provide proof of a second opinion. CP 65.

1. The first complaint received by the Board

The Board received its first complaint about Hiesterman in late 2013, around the same time that he had contacted WPHP. CP 107. This first complaint alleged that Hiesterman had been arrested and convicted of DUI in both Idaho and Michigan. CP 113. In response to the complaint, the Board requested Hiesterman provide it with information as part of its investigation. CP 113-14. 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 concluded he did not meet the alcohol dependence or abuse criteria. CP 118-119.

2. The second complaint received by the Board

Meanwhile, based on the evaluation from the Betty Ford Center, WPHP imposed a deadline for Hiesterman to either “make arrangements to enter treatment or complete a re-evaluation 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, Hiesterman informed WPHP that he was refusing to follow their requirements to stay in compliance with WPHP. CP 109. WPHP notified 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. Hiesterman did not pursue either option. CP 65.

Thereafter, WPHP made its report about Hiesterman to the Board – this was the second complaint the Board received about

Hiesterman. CP 121-22. In its report, WPHP noted that Hiesterman had been diagnosed with untreated alcohol dependence and was out of compliance with WPHP's treatment recommendations. CP 121-22. Thus, WPHP could not endorse Hiesterman as fit to practice with appropriate safety to patients. CP 121-22.

3. The Board issued a statement of charges and related news release concerning Hiesterman

In May 2014, after conducting a lengthy investigation, the Board mailed Hiesterman a Statement of Allegations and Summary of Evidence against him, CP 125-27, followed by a formal Statement of Charges against his license in December 2014. CP 129-33. In response, Hiesterman denied a number of the charges and requested a hearing. CP 135-36.

As required by the UDA, in February 2015, the Department issued a news release announcing the charges against Hiesterman based on his two DUI offenses, concerns about his ability to practice medicine safely without treatment,

abstinence, and recovery, and his lack of compliance with treatment directives. CP 144. The news release stated that Hiesterman had been “convicted of driving while intoxicated in 2006 in Michigan and in 2013 in Idaho.” CP 144.

4. After an administrative hearing, the Board suspended Hiesterman’s license and issued another press release

An administrative hearing was held in June 2015. CP 54-55. Both the Department and Hiesterman presented evidence and witness testimony. CP 55-57, 73. Following the hearing, the Board issued an Amended Final Order in December 2015. CP 54-73. The Board made certain factual findings, CP 57-69, and, based on these findings, the Board agreed with the Department that Hiesterman was “unable to practice medicine with reasonable skill and safety as defined in RCW 18.130.170(1).” CP 70. Accordingly, the Board suspended Hiesterman’s medical license. CP 71. Prior to filing a petition for reinstatement, Hiesterman was required to undergo a substance

abuse monitoring program. CP 71. While Hiesterman was entitled to appeal the Amended Final Order, he did not. CP 242.

Pursuant to the UDA, in March 2016, the Department issued a second news release, which reported the disciplinary action taken against Hiesterman's license arising out of the two alcohol related offenses and his lack of compliance with treatment recommendations. CP 186. Again, the release stated that Hiesterman had been "convicted of driving while intoxicated in 2006 in Michigan and in 2013 in Idaho." CP 186.

C. The Board Reinstated Hiesterman's License with Conditions, Which the Board Ultimately Removed

In April 2016, four months after his license was suspended, the Board granted Hiesterman's request for reinstatement pursuant to certain conditions related to rehabilitation and monitoring. CP 97-101.

Ultimately, in March 2017, the Board issued an order removing the conditions on Hiesterman's license. CP 103-05. The Department then reported the removal of conditions from

Hiesterman's license. CP 31. Contrary to Hiesterman's allegations that the Department's website indicates that his license is active "with conditions," Pet. for Rev. at 5 (citing CP 158), the website currently makes no reference to any conditions and indicates his credential status as "active." See Dep't of Health, Provider Credential Search, <https://fortress.wa.gov/doh/providercredentialsearch> (last visited May 17, 2023).

D. Procedural History in the Trial Court

In September 2017, Hiesterman filed suit against the Department in Spokane County Superior Court alleging claims of negligence, defamation, and tortious interference with business expectancy. SCP 3-9; SCP 16-17.² The premise of these claims was, among other things, Hiesterman's allegations that

² The month after he filed his original complaint, Hiesterman filed an Amended Complaint for Damages. SCP 12-18.

the Department relayed false information through its issuance of press releases about his alcohol offenses. SCP 15.

In May 2019, after venue transferred to Thurston County, the Department moved for summary judgment seeking dismissal of all claims. CP 4-28. Among other things, the Department argued that it was statutorily immune from Hiesterman's lawsuit under RCW 18.130.300(1). CP 14-20.

Hiesterman opposed the motion and argued that, as a matter of statutory interpretation, the Department has no immunity under RCW 18.130.100(1) for administrative acts taken after the licensing suspension decision. *See, e.g.*, CP 241-43. Hiesterman did not argue that RCW 18.130.300 was unconstitutional. CP 241-43. Nor was he critical of the *Janaszak* decision, and he did not argue that it was unconstitutional. CP 241-43.

The trial court granted the Department's Motion for Summary Judgment concluding that the Department was immune under RCW 18.130.300(1). RP 13-14. In granting the

Department's motion, the Court dismissed Hiesterman's claims with prejudice. CP 280.

E. Procedural History in the Court of Appeals

Hiesterman appealed and raised three distinct issues in the Court of Appeals. First, whether RCW 18.130.300(1) is unconstitutional because it creates irrevocable immunity under article I, section 8 of the Washington Constitution. *Hiesterman v. Dep't. of Health*, 24 Wn. App. 2d 907, 912-14, 524 P.3d 693 (2023). Second, whether the *Janaszak* case is an unconstitutional extension of immunity in violation of article II, section 26 of the Washington Constitution. *Id.* at 914-17. Third, whether RCW 18.130.300 protects the reporting of the actions taken against Hiesterman's license through press releases. *Id.* at 917-19.

The Court of Appeals affirmed the trial court's summary judgment order. *Hiesterman*, 24 Wn. App. 2d at 919. Regarding the first two issues challenging the constitutionality of RCW 18.130.300(1) and the constitutionality of the *Janaszak* decision,

the Court declined to address the merits of these challenges because Hiesterman failed to preserve his constitutional claims and the claimed constitutional errors were not manifest. *Id.* at 913, 916-17. Regarding the third issue, challenging the application of RCW 18.130.300 to the Department's reporting of the action, the Court concluded that, by its unambiguous language, the statutory immunity applies to the required reporting action. *Id.* at 918.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Hiesterman Fails to Establish Any of the RAP 13.4(b) Criteria

At the outset, Hiesterman fails to address, much less satisfy, the criteria in RAP 13.4(b) for accepting review of a Court of Appeals decision terminating review. Hiesterman contends only that "Division II committed error in its application of the standard for considering the unconstitutionality of a statute for the first time on appeal." Pet. for Rev. at 7. But review requires more than an alleged error. A party must satisfy the

standards set forth in RAP 13.4. RAP 13.4(b) (stating “a petition for review will be accepted by the Supreme Court *only*” if one of the standards is satisfied). This is the petitioner’s burden: “[T]he petitioner must persuade us that one of the standards is satisfied.” *In Re Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011) (en banc). Further, RAP 13.4(c)(7), provides that the argument section of a petition for review should contain “[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.”

Contrary to RAP 13.4(c)(7), Hiesterman fails to explain why review is warranted by addressing any of the factors under RAP 13.4(b). *See generally* Pet. for Rev. In fact, Hiesterman fails to even cite to RAP 13.4(b). Hiesterman’s failure to even argue, much less establish, the RAP 13.4(b) factors is a sufficient basis to deny review. This Court need not proceed any further.

Further, as addressed below, Hiesterman not only *did* not establish that review is warranted, Hiesterman *could not* have done so.

B. This Case Does Not Present Any Significant Question of Constitutional Law

This case does not squarely present any constitutional issues. Hiesterman attempts to raise two such issues, but the Court of Appeals correctly concluded that Hiesterman failed to preserve either issue. *Hiesterman*, 24 Wn. App. 2d at 913-14. The Court of Appeals also correctly concluded that Hiesterman’s “conclusory” assertions and otherwise unpersuasive arguments were insufficient to establish a “manifest error affecting a constitutional right” *Id.* at 914-17 (citing RAP 2.5(a)(3)). That conclusion does not warrant review.

1. Hiesterman’s challenge to RCW 18.130.300 does not present a significant constitutional question

Because Hiesterman failed to preserve his article I, section 8 constitutional challenge to RCW 18.130.300(1) by not raising this issue to the trial court, the Court of Appeals properly addressed whether the claimed error was a “manifest error affecting constitutional rights.” *See* RAP 2.5(a)(3). The Court of Appeals focused on the third step of the *State v. Lynn*, 67 Wn.

App. 339, 345, 835 P.2d 251 (1992), approach where the court must “address the merits of the constitutional issue.” *Hiesterman*, 24 Wn. App. 2d at 913 (quoting *Lynn*, 67 Wn. App. at 345). The court then properly relied on *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998), for the proposition that the party challenging the constitutionality of a statute must “by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.” *Hiesterman*, 24 Wn. App. 2d at 914 (quotation marks omitted).

The Court of Appeals concluded that *Hiesterman* failed to meet that standard, having instead asserted “in conclusory fashion” that RCW 18.130.300 grants irrevocable immunity, which denied *Hiesterman* his recourse. *Id.* The court thus declined to consider the merits of *Hiesterman*’s constitutional challenge because he “fail[ed] to show that there is no reasonable doubt that the statute violates the constitution” and thus failed to show that the alleged constitutional error was manifest so as to require review under RAP 2.5(a).

Hiesterman repeats that analytical error in his petition to this Court. While recognizing that the Court of Appeals did not address the merits because he did not convince that Court that “there is no reasonable doubt that the statute violated the constitution,” Hiesterman fails to rebut the Court’s conclusion. Pet. for Rev. at 10 (citation omitted). Instead, he summarily concludes that the Court should have addressed the merits of his argument by arguing the merits.

Hiesterman’s argument remains conclusory and still fails to show a manifest error. Simply stated, RCW 18.130.300 does not violate article I, section 8 of the Constitution. In attempting to argue the merits in his petition, Hiesterman makes the same conclusory argument he made below that the statute violates the Constitution because it “grants irrevocable immunity to state actors which denies wronged plaintiffs any remedy for negligent acts committed under the color of state law.” Pet. for Rev. at 11. Hiesterman cites to no

case law or other authority addressing the application of article I, section 8.

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 providing for irrevocable immunity. By its plain definition, irrevocable means “not able to be changed, reversed, or recovered; final.” *Merriam-Webster's Dictionary*, <https://www.merriam-webster.com> (last visited May 16, 2023).

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 in his petition and his argument lacks any textual analysis.

Fundamentally, Hiesterman mistakenly conflates absolute immunity with irrevocable immunity. Absolute immunity—like that created by RCW 18.130.300(1)—is well-established in Washington law. *E.g.*, *Taggart v. State*, 118 Wn.2d 195, 209, 822 P.2d 243 (1992) (recognizing absolute quasi-judicial immunity for certain parole board actions); *Creelman v. Svenning*, 67 Wn.2d 882, 884-85, 410 P.2d 606 (1966) (recognizing absolute immunity for prosecutors); *Beltran v. Santa Clara Cty.*, 514 F.3d 906, 908 (9th Cir. 2008) (social workers enjoy absolute immunity when they make discretionary, quasi-prosecutorial decisions to institute court dependency proceedings). Hiesterman does not even attempt to square his argument with these decisions. This further undermines any argument that there was a manifest constitutional error in this case.

In sum, Hiesterman fails to establish any significant question of constitutional law with respect to the constitutionality of RCW 18.130.300(1).

2. Heisterman’s challenge to *Janaszak* does not present a significant constitutional question

Heisterman next advances the novel suggestion that the Court of Appeals violated the Washington Constitution when it decided *Janaszak*. This also fails to present a significant constitutional question.

Similar to the previous issue, Heisterman also failed to preserve the argument that *Janaszak* violates article II, § 26 of the Washington Constitution. *Heisterman*, 24 Wn. App. 2d at 914. The Court of Appeals again properly applied RAP 2.5(a)(3) and concluded that the claimed error was not a manifest error affecting a constitutional right. *Id.* at 917.

Heisterman contends that, in interpreting RCW 18.130.300 to extend immunity to the State and the Department, the Court of Appeals in *Janaszak* somehow violated article II, section 26 of the Washington Constitution. That provision states, “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” Art. II, § 26. Nothing about that constitutional provision states or implies that

courts are prohibited from interpreting statutes or the common law to extend immunity to governmental entities. In fact, that novel argument is inconsistent with numerous decisions of this Court. *E.g.*, *Adkins v. Clark County*, 105 Wn.2d 675, 717 P.2d 274 (1986) (applying judicial immunity in case against county and state); *Creelman*, 67 Wn.2d at 885 (recognizing application of prosecutorial immunity to the state and county). Hiesterman fails to establish a manifest error.

C. Hiesterman Fails to Establish Conflict with any Published Decision

Hiesterman does not identify any published decision with which the Court of Appeals decision allegedly conflicts. The closest he comes is a suggestion that *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995), would be “[a] more appropriate ruling to apply to the case here.” Pet. for Rev. at 15. But there is no conflict with *Savage*, as both the *Hiesterman* court and *Janaszak* court expressly concluded.

Hiesterman mistakenly relies on *Savage* for the proposition that it “recognized a constitutional problem where

absolute immunity of an individual extends to the state” Pet. for Rev. at 15. *Savage* does no such thing. To the contrary, as the Court of Appeals pointed out, *Savage* “contradicts his position because it provides that courts *may* extend immunity upon the appropriate policy examinations.” *Hiesterman*, 24 Wn. App. 2d at 916 (emphasis added). The *Janaszak* court reached the same conclusion. 173 Wn. App. at 717 (“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.”). There is no conflict between the Court of Appeals decision in this case and *Savage*.

D. The Court of Appeals Correctly Interpreted RCW 18.130.300(1)

While not a sufficient RAP 13.4(b) basis for review, it also bears noting that *Hiesterman* is wrong in suggesting that the Court of Appeals erroneously interpreted RCW 18.130.300. *Hiesterman* continues to suggest that the statutory immunity does not apply to “an administrative act.” Pet. for Rev. at 19. As the

Court of Appeals correctly pointed out, “the plain unambiguous language of the statute” includes any “official act performed in the course of [the Board’s] duties.” *Hiesterman*, 24 Wn. App. 2d at 918-19. In his petition for review, Hiesterman still has no answer to the plain language of the statute. His disagreement with the legislative policy decision reflected in RCW 18.130.300 is not a basis for review by this Court.

V. CONCLUSION

For all the above reasons, review should be denied.

This document contains 3,779 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of May,
2023.

ROBERT W. FERGUSON
Attorney General

s/ Timothy E. Allen

TIMOTHY E. ALLEN WSBA #29415
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744
OID #91019

CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the RESPONDENT'S ANSWER TO PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

Chad Freebourn
Roberts Freebourn, PLLC
1325 West 1st Ave., Suite 303
Spokane WA 98201
Chad@robertsfreebourn.com
Attorney for Appellant Hiesterman

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

EXECUTED this 24th day of May 2023, at Seattle, Washington.

/s Kathie Fudge
KATHIE FUDGE
Legal Assistant

AGO TORTS SEATTLE

May 24, 2023 - 2:31 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,831-2
Appellate Court Case Title: Mark Andrew Hiesterman v. State of WA State Dept. of Health
Superior Court Case Number: 18-2-03884-4

The following documents have been uploaded:

- 1018312_Answer_Reply_20230524142329SC061206_7464.pdf
This File Contains:
Answer/Reply - Reply to Answer to Petition for Review
The Original File Name was PFRAnswer_Final_20230524.pdf

A copy of the uploaded files will be sent to:

- Heather@robertsfreebourne.com
- Kathie.fudge@atg.wa.gov
- LALOLyEF@ATG.WA.GOV
- Matthew.Gjenvick@atg.wa.gov
- TORTTAP@atg.wa.gov
- TorSeaEf@atg.wa.gov
- annya.ritchie@atg.wa.gov
- chad@robertsfreebourn.com
- heather@robertsfreebourn.com
- kaylynn@ssslawgroup.com
- kevin@robertsfreebourn.com
- laurenm@robertsfreebourn.com
- mail@ssslawgroup.com
- nikki.gamon@atg.wa.gov

Comments:

Sender Name: Kathie Fudge - Email: Kathie.fudge@atg.wa.gov

Filing on Behalf of: Timothy E Allen - Email: timothy.allen@atg.wa.gov (Alternate Email: TORSeaEF@atg.wa.gov)

Address:
800 5th Avenue, Suite 2000
Seattle, WA, 98104
Phone: (206) 464-7352

Note: The Filing Id is 20230524142329SC061206