

72162-3

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No. 72162-3

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

LISA CUMMINGS dba MOD INVESTIGATIONS
Appellant – Petitioner.

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING
Respondent

APPELLANT'S REPLY BRIEF

RECEIVED
COURT OF APPEALS
DIVISION I
JAN 19 2013

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I. INTRODUCTION

Respondent's response brief fails to meaningfully address many of the issues Appellant has brought on appeal. That brief is replete with mischaracterizations of Appellant's position combined with assertions that its decisions are effectively not reviewable. Respondent believes that it can characterize findings of facts as credibility determinations and escape the need to support those findings with substantial evidence when viewing the record as a whole. Further, Respondent believes that reviewing the evidence with reference to the record as a whole constitutes impermissible "re-weighing."

Respondent creates out of context legal definitions to support its charges. Respondent defines "incompetence," "malpractice" and "negligence" without reference to the purpose of the statute in order to escape its need to establish professional standards through testimony. Respondent fails to establish the meaning of "assists" and instead argues that the statute is ambiguous and thus its definition is entitled to deference.

Respondent also produces no evidence to support key findings. Respondent bases its conclusion that Duncan hired Appellant with inferences and no direct evidence. Respondent produces no evidence that Duncan asked Appellant to track Peddle. Respondent produces no evidence that Appellant assisted Duncan. Respondent errs as a matter of law in finding

that Appellant's conduct amounted to "moral turpitude" or "dishonesty". Respondent is left with resorting to declaring statutes "ambiguous" in order to cover up the fact that it has produced no evidence to support its findings.

II. ARGUMENT

a. Respondent Erroneously Argues That Appellant Failed To Assign Error.

Respondent asserts that Appellant did not properly assign error. Respondent's Response Brief (hereinafter "Response") at 15. Accordingly, Respondent asserts that they should be treated as verities. Respondent's assertion is wrong based on the plain reading of RAP 10.3(g) and the case law.

Respondent only cites the first half of the rule in RAP 10.3(g). That rule states that "the appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." (emphasis added). The plain reading of that rule is that an error can be assigned in the assignment of error section of a brief or in the following discussion. Clearly, Appellant detailed in her brief where the Respondent failed to support its findings with substantial evidence, as evidenced by Respondent's 48 page brief addressing those assignments of error.

Respondent's assertion also errs in its interpretation of the law. Respondent points to *In re Petersen*¹ and *United Nursing Homes, Inc. v. NcNutt*² in support of its position. However, those cases do no more than recite the first half of RAP 10.3(g). The Washington State Supreme Court has repeatedly made it very clear that substance over form shall prevail, and that a Respondent must show prejudice before the merits won't be considered. For example, in *State v. Olson*, the Supreme Court held:

It is clear from the language of RAP 1.2(a), and the cases decided by this Court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue. In this case, as the Court of Appeals noted: The notice of appeal clearly states what is intended, the brief was sufficient for Olson to respond, and he has responded. Olson has not been prejudiced and the review process has not been significantly impeded by any technical inadequacy in the State's opening brief. Under these circumstances, it cannot be said that the Court of Appeals abused its discretion under RAP 1.2(a) in deciding to consider the merits of the case, "promoting substance over form." There is no compelling reason why this case should not be decided on its merits. The Court of Appeals properly exercised its discretion in this case and we therefore affirm its denial of Mr. Olson's motion to dismiss.

¹ 180 Wn.2d 768, 780, 329 P.3d 853 (2014)

² 35 Wn. App. 632, 634, 669 P.2d 476 (1983).

893 P.2d 629, 126 Wn.2d 315, 319 (Wash. 1995) (citation omitted).³ In the present case, even if we grant that Appellant failed to place all of the assignments of error regarding factual findings in that entitled section, Appellant clearly set them out in her brief and Respondent responded to them. Respondent received sufficient information to respond and does not even claim it did not receive sufficient information to respond. In fact, Respondent spent 48 pages responding to Appellants assertions regarding its findings of fact.

b. Respondent Assigns Incorrect Standard of Review On Appeal.

Respondent is confused about the distinction between a credibility determination and a finding of fact. The record is replete with characterizations of Respondents findings of fact as “credibility determinations.” For example, Respondent concludes that it “...determined Cummings’s claim that she was acting as Duncan’s life coach was not credible...” *Id.* at 18. Again, Respondent writes that “[t]he Director also determined that Cummings’s claim that she was not assisting Duncan by placing the GPS devise and performing other investigative services was not credible.” *Id.* at 19. Respondent later writes that “Cummings self-serving assertion that she acted because of her general

³See also *Smith v. Employment Security Department*, 155 Wn. App. at 33; *Hitchcock v. Dep't of Ret. Sys.*, 39 Wn. App. 67, 72 n. 3, 692 P.2d 834 (1984) review denied, 103 Wn.2d 1025 (1985).

desire to protect vulnerable children is not credible (as the Director found) and does not negate the other evidence demonstrating Cummings was acting on Duncan's behalf." *Id.* at 20. Respondent writes that "[i]t was simply not credible that Cummings was acting as anything other than a private investigator and acting on Duncan's behalf when she engaged in the conduct [of tracking Peddle]." *Id.* at 23. "The Director also determined that Cummings's claim that she was not assisting Duncan by placing the GPS device and performing other investigative services was not credible...(specifically labeled credibility finding)." *Id.* at 19. Those are not credibility determinations deserving of deference just because Respondent has specifically labeled them as such. Rather, they are findings of fact subject to review to establish if there was substantial evidence when viewing the record as a whole to support them.

Respondent wrongly insists that it can make credibility determinations regarding its conclusion of facts. Respondent cites *State v. Walton* for the proposition that its credibility determinations must be given due regard. 64 Wn. App. 410, 824 P.2d 533 (1992). *Walton* and other cases stand for the proposition that the trier of fact determines the weight of evidence it directly observes, but that the burden of proof still must be met. *Id.* at 416. *Walton* does not stand for the proposition that findings of

fact can be labeled credibility determinations and given the deference accorded to them.⁴

Credibility determinations go to the weight given to particular testimony. The reason is obvious: a reviewing court does not have first-hand knowledge of the demeanor of the witness on the witness stand.⁵ However, a reviewing court can review the basis for factual findings as described in the findings of facts. The Washington State Supreme Court has repeatedly understood this:

As an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are. Our duty, on review, is to determine whether there exists the necessary quantum of proof to support the trial court's findings of fact and order of permanent deprivation.

In re Sego, 513 P.2d 831, 82 Wn.2d 736, 739-740 (Wash. 1973) (citations omitted); *see also Dillon v. Seattle Deposition Reporters, LLC*, 316 P.3d 1119, 1126 (Div. 1 2014) (credibility determination limited to witnesses testimony). In other words, the trial court's credibility determinations go

⁴ See, e.g., Madsen's concurring/dissenting opinion in *State v. Devries*, where he explains that this deference goes to the weight of the evidence, but that the overall burden of proof must be met. 149 Wn.2d 849, 859, 72 P.3d 748 (en banc) (Wash. 2003).

⁵ See, e.g., *State v. McCabe*, 161 Wn. App. 781, 271 P.3d 264 (Div. 3 2011) (courts may decline to defer to the credibility of a hearing officer where the officer did not have opportunity to observe firsthand the testimony "precisely because the hearing officer is not necessarily in a better position to judge their veracity.").

to the weight it gives to testimony, and not directly to its findings of fact. In the present case, Respondent repeatedly tries to couch their findings of facts as matters of credibility. While terribly convenient for them to do so, that position is not supported by the law.

c. Respondent Misunderstands What An Inference Is.

Respondent asserts that its reasonable inferences are sufficient to sustain the allegations. Response at 30. An inference may be a commonly accepted standard of judicial reasoning, but by its very nature an inference must have a factual underpinning to base it upon. Without that underpinning, what Respondent calls “inference” is really baseless speculation that cannot sustain an allegation. Appellant merely asks the reviewing court to assess all of the evidence in the record as a whole in order to determine if substantial evidence supports Respondent’s findings of fact. Where there is no evidence produced, such as whether Appellant was acting as a private investigator, took instruction from her “client,” and passed information on to her client, Respondent’s “inference” does not constitute substantial evidence when viewing the record as a whole. Rather, it represents baseless speculation that is arbitrary and capricious.

d. Respondent Wrongly Asserts That Appellant Asks Reviewing Tribunal To ‘Re-Weigh’ The Evidence. Rather, Appellant Asks This Court To Determine If Substantial Evidence Was Presented When Viewing The Entire Record.

Appellant is not asking this court to reweigh evidence. Respondent cites *Tapper v. Emp't Sec. Dep't* for the proposition that a trier-of-fact evaluates the credibility of witnesses and weighs the persuasiveness of evidence. 122 Wn.2d 397, 403, 858 P.2d 494 (1993). From that, Respondent asserts that Appellant is asking that the reviewing court reassign the weight it had given to the testimony of witnesses or the persuasiveness of evidence. Response at 11. That assertion is in error, as appellant asks this Court to review the findings of fact to see if they are supported by substantial evidence when viewing the record as a whole.

Respondent fails to provide the correct standard for reviewing its findings of fact. Respondent cites *William Dickson C. v. Puget Sound Air Pollution Control Agency* for the proposition that a court's specific factual findings must be supported by substantial evidence. 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Respondent fails to add that a reviewing court looks for a quantity of evidence that is "substantial when viewed in light of the record as a whole." RCW 34.05.570(3)(e); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 33, 226 P.3d 263 (Div. 2 2010). The omission is critical: when determining if there was substantial evidence to support a factual finding, there must be an appraisal of the evidence in the record as a whole that supports or undermines the particular finding. Thus, Respondent erroneously asserts that Appellant is asking this Court to "re-

weigh” the evidence when all she is asking is that the reviewing court review the record as a whole and see if substantial evidence exists. Such a review entitles the reviewing court to consider all of the evidence and reach its own conclusion whether there was substantial evidence to support the Department’s conclusions of fact.

e. Respondent Conveniently Argues That The Governing Statute Is Ambiguous In Order To Cover Up The Absence of Evidence.

Violations of RCW 18.165.160(11) only apply where each of five factors is met. Specifically, that statute requires that (1) if the Respondent had been working as an investigator, (2) had been assisting a client, (3) had known that the client was subject to a protective order, (4) knew the terms of the protective order, and (5) had been asked by the client to locate or trace the person on whose benefit the protective order had been obtained.

(emphasis added). The remaining charges, contained in RCW 18.235.130(1), (4), (8) and (10), depend upon Respondent showing that Appellant was acting as a private investigator when she placed the GPS.

Respondent made no attempt to define “assisting,” either at the hearing or now. The common definition of “assists” is “to give support or aid.” The American Heritage Dictionary of the English Language, Fourth Ed. (2009). The meaning almost universally attributed to “assists” or “assisting” involves an active interaction between the actor and the subject

who is the intended beneficiary.⁶ Respondent does not use that common definition or present its own definition. Respondent simply asserts that “...Cummings placed a GPS device on Peddle’s vehicle, thereby assisting Duncan in locating, tracing, or contacting Peddle.” *Id.* at 28. Merely placing a GPS on another’s car cannot rise to “assisting” without more as Appellant could have been engaged in the activity for her own, independent purposes or for any other purpose. Nor could Appellant have assisted Duncan if she didn’t pass any information to him.

Realizing the shortcomings in its case, Respondent asserts that there is ambiguity in the statute. Response at 27-28. Respondent asserts that it need not show that Duncan asked Appellant to track Peddle or that Appellant ever passed information on to Duncan in order to satisfy the statute’s requirement that a private investigator be assisting a client and asked by a client to trace a person. Respondent writes that a party can assist another without having been asked by that other to engage in the conduct or benefit from that conduct (in this case, receiving the information from the GPS). *Id.* at 28. That is clearly a non-sensical reading.

⁶ In the context of attorneys assisting clients, the conduct is composed of active involvement with the client. In plea bargaining, “counsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant’s case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty.” *State v. Edwards*, 294 P.3d 708, 171 Wn. App. 379 (Div. 2 2012) citing *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). Elsewhere, the attorney “encouraged” and “steered” the client. *State v. Anaya*, 62649-3-1 (Division 1 2010)(unpublished).

There is nothing ambiguous about the statute. The statute clearly and unambiguously requires that a private investigator was assisting a client and also was asked by the client to trace the subject. In the present case, Respondent presented no evidence whatsoever regarding those elements, whereas Appellant presented evidence that those elements were not met. It is unclear how Appellant could have been “assisting” Duncan if he did not ask her to track Peddle and Appellant did not pass information back to him. Obviously, Respondent insists that those are not necessary elements because it did not and cannot produce any evidence to support those findings of fact. See below. As a result, Respondent does not prove its case of unprofessional conduct.

f. Respondent Produced No Evidence That Duncan Hired Appellant.

Respondent erroneously concludes that the choice presented to this Court is between Appellant working for Duncan as a private investigator or as a life coach. Response at 17-18. They, or this court, are not limited to those choices. For example, Appellant could have been working in neither capacity, but rather as a private individual misguidedly attempting to prevent a future theoretical wrong. The record as a whole supports such a conclusion. In any case, the question is whether there is substantial

evidence when viewing the record as a whole that Appellant was acting as a private investigator.

Respondent produced no evidence that Duncan hired Appellant as a private investigator. Respondent admitted that there were no indicators of such a relationship, such as a client files, progress reports, a contract, receipts, payment for services, “or anything like that.” CP4A TAH at 302; *see also* Haglund’s testimony, *id.* at 453. Respondent supports its conclusion solely on the basis that by placing a GPS device Appellant had performed an activity that a private investigator might. Response at 19, citing TAH at 339; *see also* testimony of Mary Haglund, *Id.* at P. 463.⁷ On its own, that conclusion is not substantial evidence. When viewing the record as a whole it ignores the substantial evidence supporting the opposite conclusion. Failure to show this element causes the charges of unprofessional conduct to also fail.

g. Respondent Admitted That It Produced NO Evidence That Appellant Assisted A Client.

Respondent cannot and does not provide any evidence whatsoever that Appellant assisted Duncan by passing on the information she gleaned from the GPS. Respondent admitted that fact in proceedings below. RP at

⁷ Respondent asserts at one point that it considered the possibility of Cummings acting as a life coach. Response at 18-19. However, that consideration cannot be taken seriously, as they admitted that they were “not really familiar with what a life coach does.” CR4A at TAH 463 (emphasis added).

28. Respondent now does no better than rest on its conclusory determinations that she must have assisted him by passing on the evidence as the two frequently met. Response at 29. Respondent must produce more than its own conclusions to satisfy the requirement of substantial evidence. No evidence is not substantial evidence.

Alternatively, Respondent erroneously asserts that sharing the information from the GPS with the client is not a necessary element to satisfy RCW 18.165.160(11). Response at 28. However, that statute plainly states that a party must have “been assisting a client” and “had been asked by the client to locate or trace the person on whose benefit the protective order had been obtained.” Respondent does not show, nor can it, how Appellant could have been assisting a client if she was not asked by the client to trace Peddle and did not pass on the information she received.

With no support for this element, the charges relating to unprofessional conduct fail.

h. Respondent Produced NO Evidence That Duncan Asked Appellant To Track Peddle.

Respondent fails to provide any evidence that Duncan, the “client,” asked Appellant to track Peddle. Respondent does not even bother to address this in its Response. Rather, it focuses on the Kirkland Police Department’s investigation, whose conclusions were enshrined in a court

document.⁸ Respondent asserts that it was “not persuasive and irrelevant” because it is the “Department of licensing, not the Kirkland Police Department, that is charged with the regulation and discipline of the private investigator statute.” Response at 21-22. Such a conclusory statement doesn’t make it so: those findings are clearly relevant and tend towards exoneration.⁹ In any case, Respondent does not dispute that it produced no evidence in support of its conclusion that Appellant was asked by her “client” to track Peddle. Failing to prove that element causes all the charges related to unprofessional conduct to fail.

i. Respondent Failed To Provide Substantial Evidence That Cummings’s Conduct Violated RCW 18.235.130(4).

Respondent uses convenient definitions of statutory terms to assert that it met its burden, but even with those definitions it fails. Respondent cites *Tenino Aerie v. Grand Aerie* for the proposition that, “in the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary. 148 Wn.2d 224, 239, 59 P.3d 655 (2002). Respondent then goes on to use Webster’s Third New

⁸ Respondent’s investigator testified that:

Q. Thank you. Now, when you were talking to him, and Detective Haas told you that after doing this investigation, independent investigation, he has now closed that case, no charges will be brought against Lisa Cummings, isn’t that true?

A. Yes.

CR4A TAH 328

⁹ Respondent also erroneously asserts that the questions the police asked Appellant during the polygraph test were unknown. Response at 22. Appellant testified as to the precise questions she was asked. CR4A TAH 414. That testimony was un rebutted.

International Dictionary of the English Language to define “incompetent,” “negligence,” and “malpractice.” Response at 31. There are several problems with Respondent’s approach and conclusions.

Respondent supports its finding of incompetence, negligence and malpractice by asserting that Appellant should have known about the no-contact orders but nevertheless placed the GPS. Respondent reaches that conclusion because Appellant knew some details of the relationship between Duncan and Peddle, knew Duncan had been in jail, and “knew enough to place the GPS.” *Id.* at 34. From that Respondent concludes that “Cummings acted incompetently and negligently and committed malpractice by failing to perform the duties of her profession and not ascertaining the propriety of her actions...” *Id.* at 35.

Respondent also asserts that Appellant demonstrated “poor judgment and incompetence” that “fell below the standard of care expected and presented unreasonable risk of harm” by “failing to take steps to remove the GPS tracking device from Peddle’s vehicle, even after Cummings admitted awareness of the protection order.” *Id.* Respondent supports that conclusion with Appellant’s admission that she left the GPS on Peddle’s car after she discovered the existence of the protective order. That conduct caused harm or potential harm, as she “disregarded the

protection order.” Further, Respondent asserts that the GPS became an issue in the Duncan – Peddle custody dispute. *Id.* at 33.

i. Respondent does not meet the burden.

Respondent does not draw the correct conclusions from *Tenino*. That case cited *State v. Sullivan* as the source of its holding that statutory definitions can be had by referencing a standard dictionary. 148 Wn.2d at FN 50 *citing Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (Wash. 2001). However, *Sullivan* further held that the interpretation of a statute must be made in the context of the purpose of the statute and also not result in “unlikely, absurd or strained consequences.” *Id.* at 239. In *Sullivan*, the Supreme Court generally deferred to Black’s Law Dictionary as the “standard dictionary.”

The intent of the governing statute is to regulate the profession. RCW 18.235.030. Thus, any of the definitions must be read with that intent in mind. *Tenino Aerie*, 148 Wn.2d at 239. Respondent’s definition of “malpractice” involves deviations from a professional standard. *Black’s Law Dictionary* defines “negligence” as “the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” 8th Edition, Bryan Gardner (ed.) (2008) at 1061. Reading that definition in conjunction with the purpose of the statute inexorably leads to the conclusion that the “reasonably prudent

person” is a practitioner in the profession and not a man on the street. Similarly, Respondent’s definition of “incompetence” – being “incapable of doing what is required”¹⁰ – also requires reference to professional standards.

Respondent was required, but failed, to establish the professional standard that Appellant is accused of having breached. Respondent acknowledges it was required to establish the standard of care when it concluded that “Cummings acted incompetently and negligently and committed malpractice by failing to perform the duties of her profession and not ascertaining the propriety of her actions despite attending court hearings, the subject of which were protection orders between Duncan and Peddle.” Response at 35 (emphasis added). However, Respondent produced no professional testimony regarding what the professional standard was other than simply concluding that Cummings’ actions “fell below the standard of care expected and presented unreasonable risk of harm.” *Id.* at 32.

Typically, a standard of care is established through expert testimony¹¹ and not through conclusory statements. Mary Haglund, the

¹⁰ Response brief at 32.

¹¹ See, e.g., *Douglas v. Freeman et al*, 117 Wn.2d at 249.

Department representative, has never acted as a private investigator.

CR4A TAH at 448-49. No other testimony was offered.

ii. Case law supports Appellant's conclusions.

All of the terms in question have common legal meanings consistent with the need to establish a standard of conduct relevant to the particular profession. Conduct that falls below a legal standard established for the protection of others against unreasonable risk amounts to negligence, *Hickethier v. Washington State Dep't of Licensing*, 159 Wn. App. 203, 213, 244 P.3d 1010 (Div. 3 2011) (citing with approval *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976)), and not merely a "failure to exercise the care that a prudent person would," as Respondent asserts. Response at 32. "Incompetence" it is that which is commonly possessed by members of that profession or trade in good standing. "It is not that of the most highly skilled, nor is it that of the average member of the profession or trade, since those who have less than median or average skill may still be competent and qualified." *Butler v. Rule*, 29 Ariz. 405, 242 P.436 (1926); *Buckner v. Wheeldon*, 225 N.C. 62, 33 S.E.2d 480 (1945); Restatement (Second) of Torts § 299A, comment E at 74-75 (1965). "Malpractice" too has a common legal meaning – the standard of care based on proof of the customary and usual practices within the profession. *See, e.g., Douglas v. Freeman et al*, 117 Wn.2d 242, 248-49, 814 P.2d 1161 (Wash. 1991). Here,

Respondent failed to establish the standard of care through testimony of professionals that Appellant is alleged to have breached and thus its charges cannot be sustained.

- iii. Respondent also failed to show that Appellant's actions created an unreasonable risk of harm to another.

Respondent fails to produce any meaningful evidence that Appellant created an unreasonable risk of harm or damage to another. Respondent simply asserts, without more, that “[t]he harm or potential to harm from Cummings’s failure to remove the GPS tracking device stemmed from the fact that Cummings disregarded the protection provided Peddle and her son by valid court orders.” Response at 33. Respondent supports its conclusion with the assertion that Appellant’s conduct impacted the Duncan-Peddle child relocation decision in some unspecified way. That ignores the evidence in the record that Peddle was never a victim of domestic violence, was never at risk of domestic violence or that Appellant never passed on any information to Duncan.

Further, Respondent does not show how Appellant’s actions impacted a child relocation decision in which the totality of the circumstances is considered. Respondent writes that it was considered in a relocation decision, but fails to show what weight it was given or the negative impact it had on anyone. *Id.* Respondent fails to develop

evidence of who was harmed, how they were harmed, or what risk of harm there was. That is clearly not sufficient to satisfy the chapter.

j. Respondent Failed To Show Moral Turpitude or Dishonesty Under RCW 18.235.130(1).

Respondent provides the definition of “turpitude” it found in Webster’s Third New International Dictionary. *Id.* at 36. In this instance, Respondent does request that this court provide a broad definition to the term by reading it in context with the statute as a whole. “In any event RCW 18.235.130(1) should be interpreted in light of the purposes of the URBP of protecting the public from unsafe professional practices.” *Id.* at 38. By that definition, Respondent argues that any conduct deemed “unsafe” rises to the level of “moral turpitude.” *Id.* Respondent then concludes that Appellant’s acts constituted turpitude as follows:

The Director concluded Cumming’s continued surveillance and monitoring of Peddle’s location rose to the level of an act of moral turpitude ... [because Cummings] conducted an investigation of Ms. Peddle, with knowledge of Mr. Duncan’s arrest on a criminal charge of domestic violence (against Ms. Peddle) and the on-going custody issues.

Id. That conclusion is in error.

Respondent’s statutory interpretation leads to nonsensical results and is otherwise impermissible. To equate “unsafe” conduct with conduct amounting to “depravity” is clearly non-sensical. Alternatively, Respondent tries to equate “moral turpitude” with “good moral character.” *Id.* at 39. It

does so without defining the terms or legal support. Further, such an equation is also non-sensical as they are two different terms with very different plain meanings used in differing contexts.

The case law Respondent cites does not support its position. Respondent cites *Haley v. Medical Disciplinary Bd.* in support of its definition of “moral turpitude,” but it misinterprets the holding in that case. In *Haley*, the court held that the meaning of “moral turpitude” is discerned by referring to the commonly understood definition within the medical community. 117 Wn.2d 720, 818 P.2d 1062 (1991)(emphasis added). That court held that the definition of “moral turpitude” could be provided by the common knowledge and understanding of the particular profession to which the statute applies” in order to establish an objective standard. *Id.* at 742 (citing *Cranston v. Richmond*, 40 Cal.3d 755, 765, 221 Cal. Rptr. 779, 710 P.2d 845 (1985)). Reference to a common English Dictionary without reference to the standards in the particular profession is thus misplaced.

Respondent also cites *In re McGrath* for the proposition that the standard of “moral turpitude” is what violates the “commonly accepted standards of good morals, honesty and justice.” 98 Wn.2d 337, 655 P.2d 232 (1982). That case involved the discipline of an attorney before the Supreme Court. The allegations were that McGrath was convicted of

knowingly causing infliction of bodily harm. The court held that “moral turpitude was defined by “the collective conscience and judgment of this court.” *Id.* at 341 (emphasis added). McGrath was an attorney and the reviewing court was composed of his peers. In other words, the definition was given meaning by others in McGrath’s profession. That is consistent with the holding in *Haley* and elsewhere.

At no time during the administrative hearing did Respondent establish what “moral turpitude” or “dishonesty” constituted within the context of the profession of private investigators. Respondent is not the profession. Accordingly, Respondent failed to meet its burden and the allegations based on moral turpitude and dishonesty must be dismissed.

Even accepting the out of context definitions, Respondent failed to show that Respondent’s conduct constituted moral turpitude or dishonesty. Respondent defines “moral turpitude” as “depravity.” Response at 36. That is consistent with the case law. *See In re Farina*, 94 Wn. App. 441, 460, 972 P.2d 531, (Div. 3 1999) (“moral turpitude” is constituted by an act of “baseness, vileness, or the depravity in private and social duties which man owes to his fellow man.”); *Heinmiller v. Department of Health*, 127 Wn.2d 595, 903 P.2d 433, 909 P.2d 1294 (1995) (social worker’s sex with patient), cert. denied, 518 U.S. 1006, 116 S.Ct. 2526, 135 L.Ed.2d 1051 (1996); *Haley*, 117 Wn.2d 720 (physician’s sex with teenage former patient in

his office including plying her with alcohol). The evidence in the record clearly does not support the finding that Appellant's conduct was depraved.

Respondent fails to meaningfully address how Appellant was dishonest. Respondent merely states, in passing in its Response brief but not in the record, that once Appellant discovered the existence of the protection order, "she did not do the honest or professional thing and take any steps to notify those who could remove the GPS device." Response at 38. However, Respondent fails to develop meaningful evidence showing that conduct was dishonest. Appellant did not misrepresent to anyone that she had placed the GPS. To the contrary, when asked she openly admitted it to the Kirkland police and to Respondent. Respondent also never provided the information so gleaned to Duncan. Once again, Respondent has failed to support its allegations with substantial evidence when viewing the record as a whole.

k. Respondent's Sanctions Should Not Be Given Deference As They Are Arbitrary and Capricious.

Respondent applies a standard for arbitrary and capricious that it does not meet. Respondent cites *Stewart v. Dep't of Social & Health Services* for the proposition that arbitrary and capricious standard requires "willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision." 162 Wn. App. 266, 273, 252 P.3d 920 (2011). Respondent asserts that it did consider "the facts and

circumstances of this case and [the sanction] is based on case-by-case discussion of unprofessional conduct using a team of Department enforcement employees, thereby striving to ensure proportionality of punishment.” Response at 14. Elsewhere, Respondent testified that it had discussed and re-discussed “everything.” CP4A TAH at 456, 464, 469. Yet, Respondent failed to consider the facts and circumstances underlying the decision – notably the mitigating factors of Respondent’s motive and lack of experience - and thus it is arbitrary and capricious.

Respondent cites *Regan v. Dep’t of Licensing* in support of its proposition that the punishment it imposed was reasonable. 130 Wn. App. 39, 59, 121 P.3d 371 (2005). That holding, however, supports Appellants position, as that court held that the punishment was imposed “after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration,” and thus was not arbitrary and capricious. *Id.* at 59 (emphasis added). Respondent argues that due consideration was given, because Appellant had an opportunity to present her case at hearing and the Director reviewed those findings. *Id.* at 46. That conclusion does not address the obvious shortcomings in Respondent’s deliberations, that at no time did it ever claim to have weighed mitigating factors, such as Appellant’s motive for acting and her relative lack of experience, a shortcoming that Judge Bradshaw also saw fit to comment on.

Respondent also argues that it does not have to be consistent in its application of punishments. *Id.* at 42. Respondent asserts that it can impose as harsh a punishment as it desires. *Id.* at 45. Respondent denies that its position is that its sentencing decisions are not reviewable, however, it does argue that they must be given deference. *Id.* at 41. That is a distinction without a difference. It is also wrong in the law, as its sanctioning power is governed by statute. Discussed below.

I. Respondent Did Not Address Appellant's Assertion That Its Decision Was Ultra Vires Because It Did Not Observe Its Governing Statute In Imposing The Punishment.

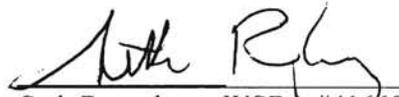
Appellant reiterates her argument that the governing statute holds that Respondent is to consider public safety and then rehabilitation of the licensee. "In determining what action is appropriate, the disciplinary authority must first consider what sanctions are necessary to protect the public health, safety, or welfare. Only after these provisions have been made may the disciplinary authority consider and include in the order requirements designed to rehabilitate the license holder or applicant." RCW 18.235.110 (3); *see also* RCW 18.165.220. Having failed to show that Respondent was a risk to the public, it needed to consider rehabilitation. Respondent did not do so.

V. CONCLUSION

For the foregoing reasons, Appellant requests that this court reverse the order of Judge Bradshaw dated July 14, 2014.

DATED THIS November 18, 2014

The Rosenberg Law Group, PLLC

A handwritten signature in black ink, appearing to read "Seth Rosenberg", written over a horizontal line.

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DECLARATION OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on November 18, 2014, I mailed a copy of the foregoing reply brief via electronic mail to the following parties:

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DATED: November 18, 2014


Seth A. Rosenberg