

NO. 39050-7-II

---

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

Servando Jasso,

Appellant,

v.

Department of Health,

Respondent.

---

APPELLANT'S OPENING BRIEF

---

A. Stephen Anderson, WSBA #8369  
A. STEPHEN ANDERSON, PS  
999 N. Northlake Way, Suite 300  
Seattle, WA 98103  
Telephone: 206.306.9464  
Facsimile: 206.440.0324

Attorneys for Appellant

09 AUG -6 PM 2:39  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR.....	1
A. Error by the Superior Court.....	1
B. Error by the Department of Health .....	2
III. STATEMENT OF THE ISSUES.....	5
IV. STATEMENT OF THE CASE .....	6
V. ARGUMENT .....	12
A. The Statement Of Charges Was Unlawful <i>Ab Initio</i> Because The Uniform Disciplinary Act Does Not Apply To Conduct Occurring Prior To June 11, 1986.....	12
B. The Unlawful Charges Filed By The Department Against Appellant Introduced Prejudice That Was Not Rectified By Their Dismissal .....	15
C. The Presiding Officer Erred In Admitting The Deposition Of AJ And Findings Of Fact And Conclusions Of Law From a Twenty- Year Old Divorce Case Under The “Common Scheme Or Plan” Exception To ER 404(b) .....	16

D. During The Hearing, The Presiding Officer Erred In Admitting Evidence Of The Alleged Sexual Abuse Of AJ ..... 21

E. The Presiding Officer Erred In Using The Alleged Abuse of AJ to Corroborate RJ’s Allegations Of Abuse ..... 24

F. The Presiding Officer’s Findings Of Fact 1.4 Through 1.14 And 1.17 Were Not Supported By Substantial Evidence ..... 26

G. Dr. O’Shaunessey’s Testimony Was Incompetent And Should Have Been Stricken As Speculative and Lacking Foundation ..... 28

H. Appellant Jasso Is Entitled To Recover His Fees And Other Expenses Incurred In Defending And Challenging The Department’s Action..... 34

V. CONCLUSION..... 34

Appendix – Chronology of Events

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Dalrymple v. Brown</i> ; 701 A.2d 164 (PA 1997) .....	14
<i>Engstrom v. Engstrom</i> , Superior Ct., Los Angeles Co., Calif., No. VCO16 157, Oct. 11, 1995, <i>aff'd</i> <i>Engstrom v. Engstrom</i> , No. B098146 (2 <sup>nd</sup> App. Dist. Cal., June 18, 1997) .....	14
<i>Franklin v. Stevenson</i> , 94-090177PI, 987 P.2d 22 (Utah 1999) .....	14
<i>John BBB Doe v. Archdiocese of Milwaukee, et. al.</i> , 565 N.W.2d 94 (WI 1997) .....	15
<i>Nguyen v. Dept. of Health</i> , 144 Wn.2d 516, 29 P.3d 689 (2001) .....	13, 27
<i>Ongom v. Dept. of Health</i> , 159 Wn.2d 132, 48 P.3d 1029 (2006) .....	13, 27
<i>Ridgeview Properties v. Starbuck</i> , 96 Wn.2d 716, 719, 638 P.2d 1231 (1982) .....	26
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003) .....	19, 20
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995) .....	18, 19
<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007) .....	24, 25

Page

Statutes

RCW 4.84.050(1) .....	34
RCW 4.84.050(3) .....	34
RCW 9A.44.120(2)(b).....	25
RCW 18.130.....	1
RCW 18.130.180(1).....	12, 27
RCW 18.130.900.....	2
RCW 18.130.900(2).....	1, 12
RCW 18.130.900(3).....	1
RCW 34.05.570(e) .....	26

Rules and Regulations

ER 403 .....	23, 26
ER 404 .....	8
ER 404(b) .....	16, 17, 22, 23

Other Authorities

Washington Practice Series, Handbook on Washington Evidence, ER 404(b).....	18
--	----

## I. INTRODUCTION

The Department of Health (“the Department” or “DOH”) unlawfully charged Appellant Servando Jasso with unprofessional conduct based in large part on alleged misconduct that predated its statutory jurisdictional parameters.<sup>1</sup> On November 20, 2007, the Department issued Findings of Fact, Conclusions of Law, and Final Order under the Uniform Disciplinary Act<sup>2</sup> (“UDA”) wrongfully revoking Appellant Servando Jasso’s registration to practice as a counselor. The Department then denied Mr. Jasso’s Petition for Reconsideration. On Mr. Jasso’s Petition for Judicial Review, the Thurston County Superior Court erroneously affirmed the Department’s action, but did not address most of the issues brought before it.

## II. ASSIGNMENTS OF ERROR

### A. Error by the Superior Court.

1. The Superior Court erred in failing to address many of the issues brought before it on Appellant’s Petition for Judicial Review.

---

<sup>1</sup> The UDA does not apply to “conduct, acts, or conditions occurring prior to June 11, 1986.” RCW 18.130.900(3).

<sup>2</sup> RCW 18.130

2. The Superior Court erred in ruling that there was substantial evidence of the abuse of RJ, which was not the issue. Rather, the issue pertinent to RJ was whether the Department of Health proved by clear, cogent and convincing evidence that Mr. Jasso abused RJ.

3. The Superior Court erred in ruling that the twenty-year-old deposition testimony of AJ was properly admitted into evidence in Appellant Jasso's disciplinary hearing.

4. The Superior Court erred in not ruling that the Department lacked jurisdiction to file the Statement of Charges.

5. The Superior Court erred in not ruling that the disciplinary proceeding below was so contaminated by charges based on alleged misconduct predating the Department's statutory authority that Mr. Jasso was denied a fair hearing and due process under the law.

6. The Superior Court erred in not finding that the Department unlawfully revoked Appellant Jasso's credential as a registered counselor.

**B. Error by the Department of Health.**

1. The Department unlawfully exceeded its authority under the UDA when, in violation of RCW 18.130.900, it charged

Appellant Jasso with unprofessional conduct based in large part on alleged acts that would have predated the Department's jurisdiction.

2. The Presiding Officer<sup>3</sup> erred in dismissing only the charges based on allegations of conduct that would have predated the Department's statutory authority, rather than dismissing the Statement of Charges in its entirety. The presence of the non-jurisdictional charges in the proceeding until they were dismissed half way through the third day of hearing, so contaminated the proceeding that Mr. Jasso was denied a fair hearing in violation of his rights to due process.

3. The Presiding Officer erred in not ruling that the disciplinary proceeding below was so contaminated by charges based on alleged misconduct predating the Department's statutory authority that Mr. Jasso was denied a fair hearing and due process under the law.

4. The Presiding Officer erred in ruling that the Department proved by clear, cogent and convincing evidence that Mr. Jasso abused his daughter, RJ.

---

<sup>3</sup> The Presiding Officer prior to the hearing was not the same Presiding Officer who conducted the hearing.

5. The Presiding Officer erred in admitting into evidence the twenty-year-old deposition testimony of AJ, taken in the matter of the 1987 dissolution of Mr. Jasso's second marriage. In her deposition, AJ alleged misconduct by Mr. Jasso that would have predated the deposition by eight years or more, and therefore predated the Department's statutory authority to consider it by seven years or more.

6. The Presiding Officer erred in admitting into evidence the Findings of Fact and Conclusion of Law entered on May 22, 1987 in the matter of the dissolution of Mr. Jasso's second marriage.

7. The Presiding Officer erred in entering Findings of Fact 1.4 through 1.14 and 1.17 as they were not supported by substantial evidence that met the clear, cogent and convincing burden of proof required in the case.

8. The Presiding Officer erred in allowing and then not striking the opinion of the Department's expert that Mr. Jasso abused RJ.

9. The Department unlawfully revoked Appellant Jasso's credential as a registered counselor.

### **III. STATEMENT OF THE ISSUES**

1. Was it unlawful for the Department to charge Mr. Jasso with unprofessional conduct under the UDA based on allegations of misconduct that would have occurred prior to June 11, 1986?
2. Did dismissing charges based on pre-jurisdictional conduct well into the administrative hearing cure the prejudice that resulted from the unlawful charges?
3. Was Mr. Jasso denied due process when he had to defend against the unlawful charges made against him?
4. Did the Department of Health err in allowing into evidence the deposition of Mr. Jasso's eldest daughter, AJ, taken on April 1, 1987 in the matter of the dissolution of Mr. Jasso's second marriage?
5. Did the Department of Health err in allowing into evidence the Findings of Fact and Conclusions of Law, entered on May 22, 1987 in the matter of the dissolution of Mr. Jasso's second marriage?
6. Did the Department prove by clear, cogent and convincing evidence that Appellant Jasso had abused his daughter, RJ?

7. Did the Department of Health err in entering Findings of Fact 1.4 through 1.14 and 1.17?

8. Did the Department lawfully revoke Mr. Jasso's credential as a registered counselor?

9. Did the Presiding Officer err in allowing the Department's expert to opine as to whether Mr. Jasso abused RJ?

10. Is the Department liable to Mr. Jasso for his attorney fees and costs incurred in defending against the unlawful charges, and for other damages resulting from the Department's misconduct?

#### **IV. STATEMENT OF THE CASE**

On September 2, 2004, Appellant Jasso's daughter from his second marriage, RJ, filed a complaint with the Department of Health alleging, largely on the basis of recovered memories, that Appellant had sexually abused her from infancy until she was ten years old. AdR 887-89.<sup>4</sup> RJ was born July 11, 1983 (AdR 751), and last saw her father when she was ten years of age. AdR 591. Thus, the alleged events would have occurred 11 to 21 years before the complaint was filed. RJ was 21 years of age when she

---

<sup>4</sup> A chronology of events is attached as Appendix 1.

filed her complaint, and 24 years old at the time of the hearing. RP 1; Appendix.

On October 17, 2006, over two years after the complaint was filed, and more than one and one-half years after the Department finished its investigation, the Department brought a Statement of Charges against Mr. Jasso alleging unprofessional conduct on the grounds that he had abused RJ (more than 13 years before charges were brought), and that he had abused his daughter from his first marriage, AJ, whom he had not seen since 1979 or 1980. AdR 1-12, 728.

All of the alleged abuse of the eldest daughter, AJ, would have taken place prior to 1980 (AdR 728), and by RJ's own characterization, the worst of the abuse she allegedly experienced would have taken place prior to January 1986 when supervised visitation began. AdR 887-89; RP 98. RJ was then two and one-half years of age. See Appendix. In her complaint, RJ said she began to "recover" memories of abuse during these early years, when she was 17 years old. AdR 887-89; RP 98. By statute, the Department had no jurisdiction under the UDA over conduct that would have occurred prior to June 11, 1986.

RJ alleged that Mr. Jasso continued to abuse her even after visitation was supervised beginning in January 1986 and continuing until visitation ceased when she was 10 years old. AdR 591.

Mr. Jasso denies having ever sexually abused his daughter RJ, and denies having ever sexually abused his oldest daughter, AJ. RP 595, 602, 610-611.

Mr. Jasso received his registration to practice as a mental health counselor in 1990. AdR 590. On October 17, 2006 the Department of Health issued a Statement of Charges alleging unprofessional conduct primarily on the basis of alleged conduct that predated the Department's jurisdiction. AdR 1-12; RP 564-65; Appendix. An administrative hearing was held on the charges beginning on September 17, 2007. AdR 587; RP 1.

Prior to the hearing, Mr. Jasso filed a motion in limine objecting to the admissibility of AJ's deposition taken in the second divorce proceeding, the Findings of Fact and Conclusions of Law from the second divorce case, and any testimony relating to those two exhibits. (AdR 366-90; AdR 690-749; AdR 750-60). The Presiding Officer denied Mr. Jasso's motion in limine and admitted the two exhibits "to show a 'common scheme or plan' relating to sexual abuse under ER 404." AdR 433-41. There was never any

evidence or argument describing any specific commonalities between AJ's allegations and those of RJ other than to say they would both have been boundary violations.

At the outset of the hearing, Mr. Jasso moved to dismiss the Statement of Charges as a matter of law on jurisdictional grounds (AdR 534-50) and moved again to exclude the deposition testimony of AJ taken in 1987 in the second divorce case and the Findings of Fact and Conclusions of Law entered in May 1987 by the court in the second divorce case. RP 17-22.

The Presiding Officer deferred ruling on Mr. Jasso's motion to dismiss until halfway through the third day of the hearing, and then dismissed all charges based on conduct alleged to have occurred prior to June 11, 1986, when the Department's jurisdiction under the UDA began. AdR 564-65; RP 564-71. However, the Presiding Officer still would not exclude the pre-jurisdictional deposition of AJ or the Findings of Fact from the second divorce case, holding that they were admissible on the grounds used by former Presiding Officer Mitchell (AdR 433-41) and also on the grounds that they were pertinent to "assess the credibility of the testimony regarding the alleged sexual abuse of RJ." AdR 598-99.

Following the hearing, the Presiding Office entered a Final Order revoking Mr. Jasso's registration to practice as a counselor for 20 years. AdR 601-02. In reaching this decision, the Department relied primarily on accusations of conduct that occurred as much as 40 years prior to the final order. See Appendix.

Mr. Jasso has been married two times. His first marriage was to Diana and took place in 1965. AdR 792; Appendix. Mr. Jasso has two children from this marriage: AJ, who was almost 40 years old when the Statement of Charges was filed, and Robert, who was then 37 years old. Mr. Jasso and Diana were divorced in 1980. AdR 792; Appendix. He has not seen his daughter, AJ, since she was 12 or 13 years old. AdR 728. In December 1981, Mr. Jasso married his second wife, Pamela. AdR 590 & 751; Appendix. Their daughter RJ was born July, 11, 1983. AdR 751. In May 1987 Mr. Jasso's marriage to Pamela was dissolved. AdR 750-760.

In a deposition given in the dissolution of Mr. Jasso's marriage from the complainant's mother, Pamela ("the second divorce"), Mr. Jasso's oldest daughter, AJ (from his first marriage), accused him of having abused her until she was about 12 or 13, which was the last time she saw him. AdR 728. What has been

characterized as “sexual abuse” allegedly began when AJ was about 11. AdR 739-40. On the basis of AJ’s testimony, which was taken by telephone because she was in the military in Germany, the second divorce court entered a finding that Mr. Jasso had abused his daughter AJ, without specifying the nature of the alleged abuse. AdR 754.

The burden of proof in the dissolution case was a preponderance of the evidence and not the higher burden of clear, cogent and convincing evidence required in Mr. Jasso’s administrative hearing. On the basis of its finding that Mr. Jasso had abused his oldest daughter, AJ, the second divorce court ordered that Mr. Jasso’s visits with his youngest daughter RJ be supervised.<sup>5</sup> AdR 754-55. These supervised visits took place for over seven years, from January 1986 until early 1993. Pamela Jasso’s parents, William and Evelyn Galbreath, supervised all visits from October 1986, until visitation ended in about 1993. RP 576.

In the second divorce, in 1987, the court found that RJ was thought by various experts to have been abused at least once, but that the identity of the abuser could not be determined. AdR 754. There was substantial circumstantial evidence that Danny

Christiansen, the husband of RJ's former babysitter, was the abuser. RJ told at least two people, Dr. Jorgenson and RJ's grandmother, that Danny had "hurt" her, and indicated to them and to others that she was afraid of him. AdR 784, 897; RP 399-400. During this second divorce proceeding, neither RJ nor her mother Pamela made any allegations that Mr. Jasso had abused RJ. AdR 750-60.

## V. ARGUMENT

### A. **The Statement Of Charges Was Unlawful *Ab Initio* Because The Uniform Disciplinary Act Does Not Apply To Conduct Occurring Prior To June 11, 1986.**

The Statement of Charges against Mr. Jasso alleged a violation of RCW 18.130.180(1) based in large part on allegations that he had abused his oldest daughter, AJ, and in substantial part on alleged "recovered memories" his daughter RJ claimed to have of events she says occurred prior to January 1, 1986, when visitation with her father became supervised. RP 576. However, all of the misconduct alleged by AJ, and the worst of the misconduct alleged by RJ, even if true, does not fall within the scope of the UDA. RCW 18.130.900(2) states that "(t)his chapter applies to any conduct, acts, or conditions occurring on or after June 11, 1986."

---

<sup>5</sup> Supervised visitation had been ordered during the pendency of the second

As the record shows, any alleged misconduct by Mr. Jasso regarding his oldest daughter AJ took place prior to 1980 (See Appendix), and the “worst” of the misconduct alleged by his daughter RJ, which was based on memories she claims to have recovered beginning when she was about 17 years old, took place prior to January 1, 1986. AdR 887-89; RP 98. Therefore, this alleged misconduct cannot lawfully be a basis for a Statement of Charges or the basis for discipline under the UDA. Any evidence supporting these allegations would be legally incompetent as evidence of unrelated, later-occurring unprofessional conduct. Moreover, as stated earlier, the findings of the court in the second divorce case (AdR 750-60) were based on a mere preponderance of the evidence and therefore did not comply with the higher standard of proof applicable in an administrative hearing – clear, cogent and convincing. *Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 29 P.3d 689 (2000); *Ongum v. Dept. of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006).

Most of RJ’s evidence is based on memories she herself acknowledges to have been “recovered memories” that came to her in “flashbacks” when she was about 17 years of age and beyond.

---

divorce by an interim ruling. RP 576.

AdR 887-89. The accuracy and reliability of these so-called “recovered memories” has been so heavily criticized throughout the medical and psychological community, that whether they actually do occur is highly controversial, let alone whether they are memories of real events. RP 475-76; 487-89. Even the Department’s own expert witness conceded that RJ’s “recovered memories” may not be true, i.e., be of real events, and that she could not conclude that Mr. Jasso had ever abused RJ based solely on such memories. RP 321, 343-46.

Evidence of so-called “recovered memories” has been ruled inadmissible by almost every court that has addressed it. Simply put, it is not competent evidence. *Franklin v. Stevenson*, 94-090177PI, 987 P.2d 22 (Utah 1999)(“[T]he trial court erred in not finding the plaintiff’s experts’ testimonies [regarding recovered memories] inadmissible.”); *Engstrom v. Engstrom*, Superior Ct., Los Angeles Co., Calif., No. VCO16 157, Oct. 11, 1995, aff’d *Engstrom v. Engstrom*, No. B098146 (2<sup>nd</sup> App. Dist. Cal., June 18, 1997); (“Repressed memory” is not generally accepted as valid and reliable by a respectable majority of the pertinent scientific community . . . .”); *Dalrymple v. Brown*, 701 A.2d 164 (PA 1997)(“[T]he validity of repressed memory theory is subject to

considerable debate in the psychological community and some courts have rejected its admissibility.”); *John BBB Doe v. Archdiocese of Milwaukee, et al.*, 565 N.W.2d 94 (WI 1997)(“[T]he consensus of professional organizations reviewing the debate is that there is no consensus on the truth or falsity of these memories.”)

**B. The Unlawful Charges Filed By The Department Against Appellant Introduced Prejudice That Was Not Rectified By Their Dismissal.**

Under the UDA, the Department of Health has no jurisdiction over conduct occurring prior to June 11, 1986. Thus, the Statement of Charges was unlawful on its face. Contrary to this statute, the Department charged Mr. Jasso based in large part on allegations of abuse that would have occurred many years prior to 1986. The Department based the unlawful charges on two items, both over 20 years old: the deposition of AJ taken in the second divorce case (AdR 690-749) and the Findings of Fact and Conclusions of Law in that case (AdR 750-60).

From the very beginning of the Department’s investigation, these unlawful allegations substantially prejudiced Mr. Jasso’s ability to receive a fair hearing. On the third day of the hearing, the Presiding Officer dismissed all charges that were based on conduct

that predated June 11, 1986. The Department claims that dismissal of the unlawful charges removed any prejudice they caused. This is simply not true. Throughout, Mr. Jasso had to defend against the unlawful charges and the specter they cast on the entire proceeding. RP 562-71.

After dismissal, the Department's remaining charges stemmed from separate allegations of abuse made by RJ that would have occurred from June 11, 1986 to 1993, when RJ was 10 years old. RP 566-71. Visitation was closely supervised during this entire period. RP 388-91. However, the Department was allowed to build their case based primarily upon inadmissible evidence of misconduct over which they had no jurisdiction and which was no longer included in their charges. This process was fundamentally unfair to Mr. Jasso and resulted in a prejudicial hearing.

**C. The Presiding Officer Erred In Admitting The Deposition Of AJ<sup>6</sup> And Findings Of Fact And Conclusions Of Law<sup>7</sup> From A Twenty-Year Old Divorce Case Under The "Common Scheme Or Plan" Exception To ER 404(b).**

At a prehearing conference, the Department's exhibits D-3 and D-4 were admitted by Judge Mitchell (the Presiding Officer at the time). See Pre-Hearing Order No. 2, AdR 433-41. These

---

<sup>6</sup> Exhibit D-3, AdR 690-749.

<sup>7</sup> Exhibit D-4, AdR 750-60.

exhibits are respectively, AJ's deposition taken April 1, 1987 during Mr. Jasso's second divorce proceeding and the Findings of Fact and Conclusions of Law from that same proceeding, entered May 22, 1987. The rationale Judge Mitchell gave for allowing these exhibits was that they fell within the "common scheme or plan" exception to ER 404(b), a rule that generally prohibits the use of evidence of prior bad acts.

ER 404(b) states that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

There are several recognized exceptions to this rule, including the allowance of evidence that shows a "common scheme or plan." The application of this exception, however, does not apply to the facts of the current case and was wrongfully used by Judge Mitchell in the Prehearing Order.

It has long been established that evidence of prior bad acts may be admissible to prove a scheme or plan of which the current

charged crime was a part.<sup>8</sup> The general theory behind the exception is that if a charged act is simply a part of an overarching design or plan, then the proof of one part of the plan could tend to prove another part of the plan. This theory, however, cannot be used to admit evidence of a prior bad act that merely involved misconduct similar to the charged act. Washington Practice Series, Handbook on Washington Evidence, ER 404(b).

In *State v Lough*, 125 Wn.2d 847 (1995) the Washington Supreme Court delineated the two types of circumstances where the “plan” exception to the ban on prior bad acts can come into play. The first is where several crimes make up constituent parts of a plan in which each crime is simply a piece of the plan. An example of this might be an armed robbery that was intended to obtain funds used to purchase illegal narcotics. There were no such circumstances in this case.

The second situation described by the court in *Lough* is where a perpetrator devises a plan and then uses it to commit separate but very similar crimes.

In *Lough*, the defendant was accused of drugging and raping a woman and the prosecution sought to admit evidence that the

---

<sup>8</sup> Mr. Jasso was not charged with a crime. The Department verified that he has

defendant had previously committed the exact same offense in the same manner against four other women. The court allowed the evidence by holding that bad acts can be admitted under the common scheme exception if the prosecution can establish that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. *Id.*

Here, the facts surrounding the alleged abuse of AJ are substantially different from those alleged by RJ. RJ alleges that when she was an infant Mr. Jasso digitally penetrated her anus and her vagina while in the shower with her or while changing her diapers. The sexual abuse alleged by the older daughter AJ did not begin until she was eleven years old; her allegations of earlier abuse were of physical and emotional abuse. AJ's and RJ's allegations are simply too different to reflect a "common scheme or plan."

Eight years after *Lough*, the Washington Supreme Court provided another example of the type of congruity required in order for bad acts to be allowed as evidence of a "common scheme or plan." In *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), the court held that in order to admit prior bad acts as evidence of a

---

no criminal record. AdR 781-2.

prior scheme the trial court must find that the prior acts show a pattern or plan with marked similarities to the facts of the current case. *Id. at 13.*

In *DeVincentis* the defendant had been charged with rape of a child and child molestation. At trial, the state attempted to introduce several prior occasions of sexual abuse of other girls. The trial court found all but one prior act to be inadmissible, a decision that was supported by the Supreme Court's analysis. The one prior act that was admitted under the "common scheme or plan" exception was admitted due to the striking factual similarities between the prior act and the current charged crime. The court found in both circumstances that the defendant's victims were between ten and thirteen years old, the defendant had repeatedly walked around in front of the victims in G-string underwear, the defendant had either asked for or given a massage, the defendant had instructed the girls to take their clothes off, and the defendant had the girls masturbate him until climax.

This decision provides a clear example of the level of factual similarity necessary before a prior bad act can be used to show a "common scheme or plan." When compared to *DeVincentis*, the case at hand does not even come close to establishing the "marked

similarity” between AJ and RJ’s accusations necessary to admit evidence of AJ’s abuse as evidence of a “common scheme or plan.” AJ’s allegations of abuse primarily focus on physical and emotional abuse during her teenage years, whereas RJ’s allegations were sexual in nature and occurred during her infancy. Judge Mitchell clearly committed an error of law by denying Mr. Jasso’s motion in limine.

**D. During The Hearing, The Presiding Officer Erred In Admitting Evidence Of The Alleged Sexual Abuse Of AJ.**

On the first day of the hearing, Mr. Jasso made a motion to dismiss, arguing that the Department of Health lacked jurisdiction to discipline Mr. Jasso based on conduct that occurred prior to the June 11, 1986 enactment of the UDA. On day three of the hearing Judge Caner ruled on the motion by dismissing all charges that allegedly occurred prior to that date. She failed, however, to rule that the exhibits and testimony relating to those alleged acts were inadmissible. This was an error of law and a misapplication of the rules of evidence.

In making her ruling, Judge Caner claimed she was relying on the rationale provided by Judge Mitchell in Prehearing Order No. 2. This means that she intended to allow the evidence under

the “common scheme or plan” exception to the general prohibition on evidence of prior bad acts. Had this been the actual basis or rationale, that would have been a misapplication of ER 404(b) as explained above in the analysis of ER 404(b) as it relates to the alleged abuse of AJ.

In actuality, however, Judge Caner made it very clear that she was allowing evidence of AJ’s abuse for a very different reason. In her ruling she stated that “the alleged sexual abuse of Mr. Jasso’s first daughter, AJ, is admitted [into evidence] and will be considered in weighing the credibility of the second daughter, RJ.” (Bates No 1530: 21, TR 565: 21). She goes on to state “[t]herefore, that evidence remains in the record related to AJ and will be used to assess credibility of the witnesses who testified in regards to alleged abuse of RJ.” (*Id. at 25*). The only witnesses who testified that Mr. Jasso had abused RJ were RJ herself (based largely on “recovered memories”) and the Department’s expert witness, Dr. O’Shaunessy, whose testimony was objectionable for reasons described below.

Although Judge Caner claimed she was relying on Judge Mitchell’s reasoning for allowing evidence of AJ’s alleged abuse, it is clear that in actuality the evidence was allowed for the sole

purpose of assessing the credibility of RJ and those who testified with regard to RJ. This action was a blatant error of law.

ER 404(b) provides a general ban on introducing evidence of past crimes or bad acts. The rule then parses out a limited number of specific exceptions that the courts have narrowly defined over time. Nowhere in the rule itself or the case law interpreting the rule is there any mention of an exception even remotely similar to the one used by the Presiding Officer. The introduction of this evidence violated ER 404(b) as the Presiding Officer allowed it to be used to bolster the complaining witness' credibility by demonstrating that Mr. Jasso acted in conformity with the earlier testimony of AJ, and not to show that Mr. Jasso had a common plan or scheme.

In addition to violating ER 404(b), the introduction of evidence relating to AJ's alleged abuse also represented a violation of ER 403. That rule specifies that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, etc..." Here, Mr. Jasso is defending himself against the complaints of RJ, not AJ, about alleged events occurring years later, which were nothing like the alleged events described by AJ. Given the

dissimilarities in time, place, context and nature of the conduct alleged, AJ's testimony had no probative value in this case and could only unfairly prejudice the trier of fact against the Appellant.

**E. The Presiding Officer Erred In Using The Alleged Abuse Of AJ to Corroborate RJ's Allegations of Abuse.**

The Presiding Officer relied on case law that does not apply in this case. In the Findings of Fact, Conclusions of Law, and Final Order the Presiding Officer cited *State v. Young*, 160 Wn.2d 799, 811-912 (2007), in support of the position that "child abuse may be proven with corroborating evidence in a criminal case." However, *Young* does not apply to the current case as it is not a criminal matter and is factually distinguishable.

In *Young*, the court evaluated whether an excited utterance of a child, a hearsay exception, is admissible where the declarant later recanted. There, a child had been molested by her then stepfather. Immediately following the alleged molestation she told three other people about the abuse while in a state of near "hysteria." Prior to trial and at trial, the child recanted her accusations, but the court admitted the testimony of the individuals who heard her excited utterances, on the grounds that they fell into the hearsay exception. The court determined that the child's

statements were admissible if there was independent corroboration of the act.

*Young* is factually distinguishable from the current case in several ways. First, the case at hand is not based on the statements of a child, but on the statements of RJ, a twenty-five-year-old woman. The allegations were not contemporaneous excited utterances, but rather were based largely on memories of abuse she had “recovered” as an adult after having been exposed to several well-known memory distorting factors over a period of years. Furthermore, none of RJ’s allegations have ever been subsequently recanted, which would be necessary in order to trigger the basis for the corroborating evidence. In *Young*, the child complainant recanted her earlier accusations, and it was that recantation that resulted in the need for corroborating evidence to support her earlier accusations. Here, not only did RJ not recant her allegations, her statements do not fall within any hearsay exception, thus there is no need for any corroborating evidence.

Finally, *Young* was based in part on RCW 9A.44.120(2)(b), which details Washington’s Child Hearsay Exception. This is not applicable to the case at hand, as RJ is not a child and her complaint was brought when she was well past the age of majority.

Due to this fact, independent corroboration of RJ's allegation through AJ's completely separate allegations is not appropriate, or admissible, as it violates ER 403 and 404.

**F. The Presiding Officer's Findings Of Fact 1.4 Through 1.14 And 1.17 Were Not Supported By Substantial Evidence.**

Under RCW 34.05.570(e) a court may provide relief if "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter."

Substantial evidence is defined to be "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719 (1982). Although the substantial evidence test gives great weight to the findings of a lower court, the test also mandates that the court overturn a decision that is based upon facts that are not supported by substantial evidence and competent proof.

The Washington Supreme Court has repeatedly recognized that licensed professionals possess a personal property right in their credentials and accordingly, they shall be afforded due process when the state seeks to revoke a license. In defining this

due process, the Court has established that the burden of proof required to revoke a license for professional misconduct is that of “clear, cogent and convincing” evidence. *Ongom v. Dept. of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006), *Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001).

Given that the Findings of Fact issued by the Presiding Officer in this case were based in large part on evidence that was improperly admitted, it is clear that these findings are not supported by substantial evidence in the record. Furthermore, even taking the inadmissible evidence into account, the evidence supporting the allegations against Mr. Jasso does not meet the strict “clear, cogent and convincing” standard required to revoke a license due to a violation of RCW 18.130.180(1).

The allegations relating to AJ – conduct over which the Department had no jurisdiction – were based on a twenty-year-old court finding that was reached on a mere preponderance of the evidence and described conduct that occurred over twenty-seven years ago.

Further, the department alleges abuse of Mr. Jasso’s youngest daughter RJ. This allegation is based largely on a complaint filed by RJ in 2004 that she admits was based in large

part on “recovered memories.” There is currently no consensus in the medical field as to the existence of so-called “recovered memories” and even those who believe they exist question their accuracy. Given the questionable nature of these memories, they could not be considered substantial evidence that Mr. Jasso abused his daughter RJ, and certainly not to the level of clear, cogent and convincing that is required.

**G. Dr. O’Shaunessey’s Testimony Was Incompetent And Should Have Been Stricken As Speculative and Lacking Foundation.**

The Department’s expert witness, Dr. O’Shaughnessy, was allowed to opine that Mr. Jasso sexually abused RJ. Dr. O’Shaunessey’s opinion weighed significantly in the Presiding Officer’s Findings of Fact. AdR 594. Mr. Jasso objected to Dr. O’Shaunessey’s testimony on various grounds including that it lacked adequate foundation. RP 147-209, 219-357. Dr. O’Shaunessey based her opinion on the combination of several factors, several of which were not even probative of the issue. Moreover, Dr. O’Shaunessey admitted that none of the individual factors by themselves established that Mr. Jasso abused his daughter, but taken together enabled her to so opine, essentially because they were an “indication of poor boundaries.” RP 258.

Though she acknowledged that there was no “overwhelming direct evidence,” she added that “there’s a sequence of indirect pieces that I believe point to this pattern.” RP 258.

The first factor Dr. O’Shaunessey relied upon was the psychological reports generated in the second divorce case (RP 258; AdR 783 (Dr. Smith), 784-87 (Dr. Jorgensen), 788-89 (Mr. Ayers, MA), 790-91 (Mr. Ayers, MA), 792-97 (Dr. Angell), 897-900 (Dr. Jorgensen), 901-02 (Dr. Jorgensen). However, none of these professionals who generated those reports could say or would say that Mr. Jasso abused his daughter. Indeed, almost everyone who had an opportunity to observe the two together commented that the relationship between Mr. Jasso and RJ appeared to be close, warm and caring. See the Guardian ad Litem report from the second divorce case, AdR 890-96. In his May 4, 1993 report, Dr. Jorgensen, who had more contact with RJ and her family than any other mental health professional, wrote: “In my assessment of the situation, I do not believe that the child has directly been maltreated by either the father or the grandparents.” AdR 786. Unlike Dr. Jorgensen and the other mental health professionals involved with the family, Dr. O’Shaunessey never met or interviewed Mr. Jasso, RJ’s mother, or RJ’s grandparents. RP 279. She never

interviewed RJ and did not meet her until the first day of the hearing. RP 278.

Dr. O'Shaunessey also claimed that Mr. Jasso's profile on certain psychological tests, all taken twenty years or more before the hearing, was not inconsistent with that of pedophiles. RP 273-75. She attributed this conclusion to the testers, themselves, though none of them said so in their reports. Apparently, Dr. O'Shaunessey was referring to those tests summarized by Dr. Jorgensen in his report of March 21, 1987. AdR 897-900. Dr. O'Shaunessey conceded that she did not know who, besides pedophiles, would have the same profiles, and that there is no psychological test that can identify a child molester. RP 273-75. Dr. O'Shaunessey never spoke with any of these professionals. RP 279.

Other factors upon which Dr. O'Shaunessey based her opinion included the deposition of AJ, taken in the second divorce case (RP 277); the Findings of Fact and Conclusions of Law from that case (RP 228-29); the fact that Mr. Jasso had no contact in many years with his three children<sup>9</sup> (RP 260); a non-specific report of a third-hand (hearsay upon hearsay upon hearsay) complaint

that Mr. Jasso had once been seen “playing with his private parts” (RP 254); the Guardian ad Litem report from the second divorce case (RP 189; AdR 890-96); the journal of RJ’s mother, Pam, allegedly kept contemporaneously during the visitation years (1986-1993) (RP 201; AdR 911-65); the complaint and testimony of RJ. AdR 887-89; RP 36-144; and a sexual liaison Mr. Jasso had in 1993 with a former adult client, that was consensual. RP 235, 279-80.

As to Pam’s diary, Dr. O’Shaunessey ignored an entire body of evidence that the entries were created for use in the divorce proceedings, contrived, and possibly just false. For example, there was in evidence a considerable collection of correspondence between the parents, Pam Jasso and Servando Jasso, spanning the period from 1982 to 1993 (AdR 798-886). Though she wrote to Mr. Jasso often during and after the dissolution case, Pam never accused Mr. Jasso of the deeds young RJ supposedly told her about. There is no mention in the divorce court’s findings (AdR 750), or in Dr. Jorgensen’s three reports (AdR 784-87, 897-900, and 901-02) of the allegations RJ supposedly made

---

<sup>9</sup> Actually, Mr. Jasso had been in contact with his son, Robert for some time. RP 598.

contemporaneously to her mother, and which her mother supposedly contemporaneously entered in her journal.

Pam provided a copy of her journal to her mother, Evelyn Galbreath, who was supervising visitation, to bolster her claim that Mr. Jasso was abusing RJ. Mrs. Galbreath was mystified about these accusations because she never saw anything that would support them. RP 387-88. Mrs. Galbreath testified that after Pam provided her a copy of her journal, Mrs. Galbreath set about doing something that to her knowledge, no one had previously done. That is, she investigated the allegations Pam made in her journal by comparing the entries to other available information, such as the babysitter's records. She found that much of the "information" Pam "recorded" was simply false. RP 407-22. Moreover, RJ testified that she never told her mother about her father abusing her because she wanted to "protect" her mother. RP 71-3.

As to RJ's "recovered memories," even Dr. O'Shaunessey, who admitted that she is not a memory expert (RP 321), conceded that so-called "recovered memories" are unreliable. RP 343-44. Dr. August Piper, a clinical psychiatrist and well-known memory expert explained at length why recovered memories are unreliable, and that they are probably not actual memories of real events, but

reconstructions built from any number of contaminating influences. RP 441-93, 506-35, 557-59. Dr. Piper recounted all the known contaminating influences in this case, of which there were many. RP 464-5, 489-90, 518, 529-34.

RJ claimed that she had memories she “always carried with [her]” of less innocuous abuse that took place under her grandparents’ noses during supervised visitation. AdR 888; RP 103. However, Dr. O’Shaunessey ignored Mrs. Galbreath’s testimony to the contrary. First, Mrs. Galbreath said that RJ was never alone with Mr. Jasso. She and her husband endeavored to ensure that one of them was always present. She testified that Mr. Jasso was aware that he was living under a cloud of accusations and suspicion, and he avoided being alone with RJ. RP 388-89. Also, in approximately 2002, when RJ would have been 19 years old, she visited her grandparents to find out “from [their] side what happened.” She told them that she “couldn’t remember anything that happened on visitations,” but she could “remember easily things that happened when I was two years old.” (RP 390-91)

**H. Appellant Jasso Is Entitled To Recover His Fees And Other Expenses Incurred In Defending And Challenging The Department's Action.**

Under the Equal Access to Justice Act, Appellant Jasso is entitled to recover "fees and other expenses" he incurred in defending himself against the Department's unlawful charges, and in challenging the Agency's decision on Appeal. RCW 4.84.050(1). "Fees and other expenses" is defined at RCW 4.84.040(3) and is quite comprehensive. It includes reasonable expenses of expert witnesses, various other case preparation expenses, and reasonable attorneys' fees.

**VI. CONCLUSION**

Appellant Jasso requests that this Court rule that:

- The Department of Health unlawfully charged Mr. Jasso with unprofessional conduct on the basis of alleged misconduct that was outside their jurisdiction;
- In doing so, the Department unlawfully forced Mr. Jasso to defend against the unlawful charges;
- Having to defend against the unlawful charges was substantially prejudicial to Mr. Jasso;

- Dismissing the unlawful charges in the third day of the hearing was insufficient to cure the prejudice to Mr. Jasso; and,
- The disciplinary sanctions imposed on Mr. Jasso, including revoking his credential as a Registered Counselor, violated his right to due process.

Appellant Jasso further asks that the Court set aside the Department's action; direct that the Department reissue Mr. Jasso's credential as a Registered Counselor, and order the Department to pay Mr. Jasso's fees and other expenses up to the statutory maximum.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 2009.

A. STEPHEN ANDERSON, PS

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

A. Stephen Anderson, WSBA #8369  
Attorney for Appellant

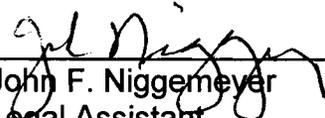
CERTIFICATE OF SERVICE

I, John F. Niggemeyer, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I served a true and correct copy of the Appellant's Opening Brief, to which this Certificate is attached, concerning the above-entitled matter on:

Heather A. Carter, AAG  
Attorney General of Washington  
Agriculture & Health Division  
7141 Cleanwater Drive SW  
P.O. Box 40109  
Olympia, WA 98504-0109

by legal messenger, for delivery no later than August 6, 2009.

Dated at Seattle, Washington this 6<sup>th</sup> day of August, 2009.

  
\_\_\_\_\_  
John F. Niggemeyer  
Legal Assistant

09 AUG -6 PM 2:39  
STATE OF WASHINGTON  
BY   
DEPUTY  
COURT OF APPEALS  
DIVISION II

**APPENDIX TO APPELLANT'S OPENING BRIEF**

**CHRONOLOGY OF EVENTS**

**SERVANDO JASSO, Appellant, v.  
DEPARTMENT OF HEALTH, Respondent**

<b>DATE</b>	<b>EVENT</b>	<b>SOURCE/REF.</b>
1965	Servando Jasso's 1 <sup>st</sup> marriage, to Diana	AdR 792
10/31/66	AJ born	AdR 590, RP 23
1/18/69	Robert Jasso born	AdR 590, RP 23-4
10/77	Jasso allegedly begins sexually harassing AJ	AdR 728 & 739-40
1980	Jasso's 1 <sup>st</sup> Divorce, from Diana; also, last time AJ saw her father	AdR 590; RP 728
12/17/81	Servando Jasso's 2 <sup>nd</sup> marriage, to Pamela	AdR 590 & 751
7/11/83	RJ born	AdR 590 & 751
6/85	SJ & Pamela separate	AdR 751
1/1/86	Supervised visitation ordered; Sue Reese is supervisor	AdR 893-94; RP 576-77
4/86 – 10/86	No visitation (visitation resumes 10/86)	RP 577
5/9/86	GAL Report	AdR 890-96
6/11/86	DOH Jurisdiction under UDA begins	RCW18.130.900
9/86	Grandparents appointed supervisors	RP 576-77
10/86	Visitation resumes	RP 577

DATE	EVENT	SOURCE/REF.
4/1/87	Deposition of AJ, taken by 2 <sup>nd</sup> wife, Pamela, in dissolution action	AdR 690
5/22/87	FF & CL in 2 <sup>nd</sup> divorce case (Pamela)	AdR 750-760
~3/88	Pamela remarries; alleges that RJ complained that SJ touched her bottom	AdR 901
1990	Jasso obtains his credential as Registered Counselor	AdR590
July '93	Jasso has consensual sex with an adult former client; Jasso was disciplined and there was a compliance file.	RP 6-7, 279
1/00	RJ "[began] to remember the worst of the abuse" when she "began to have flashbacks"	AdR 887
9/2/04	RJ makes her complaint to DOH	AdR 887-89
10/18/06	Statement of Charges, based in large part on allegations of misconduct that would have occurred almost forty years before	AdR 1-12
9/17/07	Disciplinary Hearing begins	RP1