

NO. 43552-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LLOYD V. OLSON, M.D.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF HEALTH,
MEDICAL QUALITY ASSURANCE COMMISSION,

Respondent

REPLY BRIEF

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Appellant

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INTRODUCTION

MQAC entirely misses Dr. Olson's point. First, it ignores material evidence, preferring a strained and deficient version of Roy's inherently incredible story. If, as MQAC concedes, there must be sufficient evidence for MQAC to find her allegations "highly probable," this Court should reverse.

Second, MQAC discusses only procedural due process, completely ignoring that Dr. Olson has a substantive due process liberty interest in practicing under his medical license. ***Nguyen v. Dep't of Health***, 144 Wn.2d 516, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002). ***Nguyen*** required MQAC actually to *have* clear, cogent and convincing evidence in order to deprive Dr. Olson of his fundamental rights. If MQAC can simply deprive doctors of their fundamental rights based on an inherently incredible – indeed "impossible" – claim, while entirely ignoring all of the other evidence disproving that improbable claim, this constitutional liberty interest is reduced to a meaningless truism.

Finally, Dr. Olson does not ask for any "new" standard of review, but rather merely insists that appellate review be meaningful and vigilant. ***In re Sego***, 82 Wn.2d 736, 513 P.2d 831 (1973) establishes the standard. This Court should reverse.

REPLY

- A. In light of MQAC's open disdain for Supreme Court precedent and Dr. Olson's fundamental rights, this Court must be vigilant to protect them both.**

Judges are sworn to uphold the constitution. There is every reason to believe that judges applying a clear, cogent and convincing standard will give due regard to the legal standard and apply it in an unbiased fashion, regardless of whatever political, moral, or other extraneous factors may bear on their decision. And of course, judges are rarely called upon to themselves deprive someone of a fundamental right outside of the criminal context, and even in that context, a jury usually weighs the evidence under proper, protective instructions that they swear to follow. Judges are vigilant guardians of fundamental constitutional rights, so the appellate standard of review is not the only safeguard against constitutional violations in our trial courts.

By contrast, MQAC is an executive-branch regulatory agency administering a quasi-criminal proceeding. Though its proceedings are also quasi-judicial, MQAC has other goals, often at odds with ensuring constitutional rights. And as an executive agency, it is subject to the political pressures and public opinion that judges swear to ignore or overcome.

Nguyen itself recognizes the importance of this institutional disparity in holding that the interest at stake – Dr. Olson’s liberty to practice under his medical license – is important enough to require real protection (144 Wn.2d at 528-29, emphases in original):

This court has *expressly* held medical disciplinary proceedings are indeed “quasicriminal.” ***In re Revocation of License of Kindschi***, 52 Wn.2d 8, 319 P.2d 824 (1958) described the unique nature of a medical disciplinary proceeding:

It is characterized as civil, not criminal, in nature; yet it is *quasi criminal* in that it is for the protection of the public, and is brought because of alleged misconduct of the doctor involved. Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose. It is not strictly adversary in nature. It is essentially a *special*, somewhat unique, statutory proceeding, in which the medical profession . . . inquires into the conduct of a member of the profession and determines whether disciplinary action is to be taken against him in order to maintain sound professional standards of conduct for the purpose of protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public.

Id. at 10-11 (first emphasis added). . . .

Because of their unique nature, constitutional due process requires quasi-criminal proceedings--instigated by the state and involving a stigma more substantial than mere loss of money--be proved by the clear preponderance of evidence. See ***Santosky [v. Kramer]***, 455 U.S. [745,] 755[, 102 S. Ct. 1388, 71 L. Ed. 2d (1982)]; ***Addington [v. Texas]***, 441 U.S. [418,] 425-26[, 99 S. Ct. 1804, 602 L. Ed. 2d 323 (1979)]. It would be incongruous and contrary to both Washington and federal precedent to allow a quasicriminal prosecution to proceed under the lowest standard of proof available.

As a result of this structural disparity in both mission and motive, our judicial branch must vigilantly protect fundamental rights and interests when reviewing MQAC's proceedings. While MQAC openly (albeit in a footnote)¹ expresses its desire to see **Nguyen** overturned, this Court both knows that the decision is good law and respects its own duty to uphold that law. By contrast, MQAC's open disdain for fundamental rights is palpable.

Therefore, not only is a higher standard of proof required in order to protect fundamental rights and interests, but it also must be satisfied. This Court should reject MQAC's willingness to accept an incredible claim, ignore credible evidence, and relegate constitutional rights to a footnote. **Nguyen**, and the constitution itself, require more. 144 Wn.2d at 518, 528-29. At a minimum, MQAC must make findings that adequately support its decisions to ignore overwhelming contrary evidence and to deprive Dr. Olson of his liberty to practice medicine under his medical license.

B. MQAC continues to omit substantial material evidence directly contradicting Roy's unsupported and inherently incredible allegations.

MQAC's briefing – like its findings – omits substantial material evidence. This is troubling, where the facts were already

¹ See BR 21 n.6 (citing *Hardee v. State*, 172 Wn.2d 1, 256 P.3d 330 (2011)).

stated, and supported, in the opening brief. With one exception, MQAC challenges none of the facts stated in the opening brief.

The one exception is, of course, very important. MQAC first asserts in the middle of its brief that Dr. Droesch's statement – if what Roy said was true, he would have seen it – “is not supported by the record.” BR 28 (citing BA 14, 38, citing AR 3532-33). To verify, here is what the record says at AR 3532-33:

Q. Did she [Roy] tell you that she saw Dr. Olson fondling or molesting the breasts of Patient A and Patient B for a minute and a half to two minutes?

A. No, she did not say that.

Q. Okay.

Would you think it reasonable that that could have happen [sic] for 90 to 120 seconds while you were in the room and you not see it?

A. Yeah. [sic]

Q. You think it's reasonable that could have happened?

A. Oh, reasonable that it could have happened?

Q. Yes.

A. I think I would have – if it was really going on for that long I think I would have seen it.

The statement – if what Roy said was true, Dr. Droesch would have seen it – is directly supported by the record. It also directly contradicts Roy's incredible claim.

In a footnote, MQAC suggests that how long the event took place "is not a critical fact." BR 28 n.8. Whatever a "critical fact" may be, it is nonetheless a material fact that Roy at best grossly exaggerated the nature of her allegations and mistakenly identified Patient A as one of the patients Dr. Olson briefly touched on the upper chest to confirm her identity:

- ◆ Dr. Droesch confirmed both that Dr. Olson asked whether Patient Three – not Patient A – had implants and also that he told Dr. Olson Patient Three had them removed. AR 3523, 3536, 3548, 3563.

This testimony directly contradicts Roy's statement that Dr. Olson commented on whether Patient A had implants, a statement that literally no one else standing close-by heard. See BA 13-14.

- ◆ Nurse Wissenbach testified that she heard Dr. Olson comment and touch the upper chest of Patient B – not Patient A – for a few seconds, and did not find his conduct inappropriate. AR 3339-41.

Nurse Wissenbach's testimony also directly supports Doctors Olson and Droesch's testimony about what happened with Patient B, and contradicts Roy's version. AR 3730.

Without findings explaining whether or why MQAC disbelieved these two independent witnesses, this Court cannot be assured that MQAC properly followed controlling law. The Court should reverse.

C. MQAC's failure to make findings regarding material evidence deprived Dr. Olson of his fundamental right to practice medicine without due process, leaving this Court with insufficient findings for meaningful review.

Dr. Droesch and Nurse Wissenbach alone raise serious doubts whether Roy mistakenly identified the relevant patients and grossly exaggerated her claims due to her personal dislike of Dr. Olson. Yet despite the inherently incredible nature of Roy's claims, her motive of personal animosity (see BA 8-9), and the other testimony directly contradicting her claim, MQAC purportedly found it highly probable. By making findings based on evidence that does not come close to meeting the clear, cogent and convincing test, MQAC violated Dr. Olson's due process liberty interest in practicing medicine. At a minimum, MQAC had to make findings explaining why it disbelieved Nurse Wissenbach and Dr. Droesch.

Also notable is MQAC's reliance on numerous other witnesses' testimony throughout its brief. MQAC selectively mentions some testimony from not only Dr. Olson and Roy, but also from Dr. Droesch, Nurse Wissenbach, Detectives Shepherd and Hansen, and doctors Ebert, Kennard, Kloth and Ahuja. MQAC thus tacitly concedes that their testimony is relevant by relying upon it. Yet none of these witnesses supported Roy's version of events.

MQAC's findings are insufficient to permit a legitimate appellate review that gives due credence to Dr. Olson's constitutional rights. Merely paying lip service to the clear, cogent and convincing standard of proof is insufficient to protect those rights. This Court should reverse.

D. Dr. Olson is not seeking a “new” standard of review, but rather a meaningful application of the “highly probable” standard.

MQAC mischaracterizes Dr. Olson's argument as seeking a “new” standard of review. BR 21-23. As Dr. Olson has noted, while Division One may have failed to apply the “highly probable” standard, it is good law and applies here. See BA 33-37. Moreover, MQAC completely fails to address Dr. Olson's key point that RCW 34.05.461(3) requires MQAC to make findings on all material issues and to identify all credibility determinations. BA 36. MQAC simply has no response to this dispositive point.

MQAC does acknowledge (at BR 22) that this Court “reworded” **Sego** in *In re Dependency of C.B.*, 61 Wn. App. 280, 283 n.2, 285, 810 P.2d 518 (1991):

To say that there was not “substantial evidence” [on appeal] is to say that the burden of production was not met . . .

[This burden can be satisfied only] by introducing evidence from which a rational trier of fact could find by clear, cogent

and convincing evidence the facts required by the substantive law defining its claim.

Here, as a matter of law, MQAC both failed to produce such evidence and also failed to make sufficient findings to allow for meaningful review under this standard. The Court should reverse.

E. MQAC has no defense for its erroneous legal conclusion that all that matters in this case is which of two witnesses is more credible.

Dr. Olson's leading assignment of error is that "MQAC erred in ruling that the 'ultimate issue' in this matter was simply whether it believed Roy or Dr. Olson." BA 2 (citing AR 1786). MQAC fails to address this error anywhere in its brief. It also fails to respond to Dr. Olson's arguments on this point. See, e.g., BA 26, 30-31, 37-40. This unquestioned legal error alone requires reversal.

Viewing Roy's highly improbable claims – and Dr. Olson's admittedly muddled testimony based on inadequate information – through this erroneously narrow lens caused MQAC to enter inadequate findings. But worse, it appears to have suggested to MQAC that two findings alone are sufficient to establish that it produced clear, cogent and convincing evidence to justify interfering with Dr. Olson's medical license. If the Court fails to redress this legal error, doctors in Washington must have little hope

that their fundamental liberty interest in practicing medicine cannot be taken away based on flimsy, incredible testimony.

F. MQAC's rush to judgment deprived Dr. Olson of his fundamental liberty interest without due process of law.

Dr. Olson also argued that MQAC rushed to judgment without adequate investigation, arbitrarily depriving him of his fundamental liberty interest. BA 40-42. Gruchalla's charge-first-ask-questions later approach is the epitome of arbitrary and capricious behavior. Dr. Olson had little time to defend himself, so little that he rushed to make assertions based on inadequate knowledge of the actual allegations against him.

MQAC's response is that "Gruchalla did her job by investigating this case as quickly as possible" and forwarding her incomplete information to MQAC. BR 35. There is little doubt at this point that MQAC so views Gruchalla's job – and its own. Dr. Olson does not believe that MQAC has ever changed its mind after issuing a summary suspension and doing a "quick" investigation.

But due process requires a fair trial before a fair tribunal, not a rush to judgment. MQAC admits that neither Gruchalla, nor MQAC, nor Dr. Olson, had the crucial records regarding Patient Three confirming his, Nurse Wissenbach's, and Dr. Droesch's

consistent testimony that the discussion about implants concerned Patient Three, not Patient A. MQAC just ignores this key testimony, like it did below. Due process requires more.

MQAC dismisses *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) as a criminal case. BR 36-38. Again, MQAC simply ignores *Nugyen*'s holding that its proceedings are quasi-criminal, requiring a higher due process standard. MQAC even argues that "Dr. Olson does not outline the alleged governmental misconduct or arbitrary conduct," albeit while in the process of (apparently) responding to Dr. Olson's point that MQAC's rush to judgment deprived him of his fundamental rights. BR 37-38. Again, MQAC's blindness to those rights – and to its own capricious acts – prove Dr. Olson's point.

G. MQAC's conclusions are contrary to law.

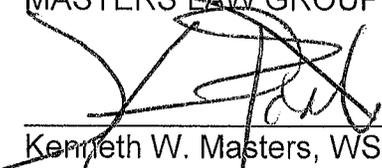
Finally, Dr. Olson argued that MQAC misapplied the law in entering its "unprofessional conduct" and "abuse" or "forceful contact" conclusions, and its sanctions. BA 42-45. MQAC's response is simply to bootstrap its insufficient findings again. BR 38-42. MQAC failed to produce clear, cogent and convincing evidence, or at the very least to make adequate findings, so its conclusions are unsupported.

CONCLUSION

In the end, this Court must either stand up for constitutional rights, or just stand for MQAC's dogged refusal to accept **Nugyen** and follow the law. MQAC's defiance is unjustified and intolerable. Fundamental rights cannot be dismissed with a "quick" look, a nudge, and a wink. This Court should reverse.

RESPECTFULLY SUBMITTED this 27th day of February,
2013.

MASTERS LAW GROUP, P.L.L.C.



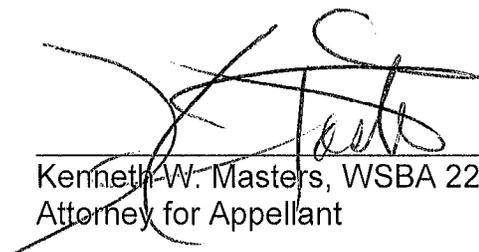
Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the ⁴27 day of February 2013, to the following counsel of record at the following addresses:

Counsel for Respondent:

Tracy L. Bahm
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100



Kenneth W. Masters, WSBA 22278
Attorney for Appellant

MASTERS LAW GROUP

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