

CASE NO. 48258-4-II

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

NARINDER M. DUGGAL, M.D.,

Appellant,

v.

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

Respondent.

REPLY BRIEF OF APPELLANT NARINDER M. DUGGAL

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I. ARGUMENT

1. **Given the substantial liberty and property interests, this is a quasi-criminal case, akin to a criminal case, with established heightened due process rights.**

In its response, the State treats this case as a run-of-the-mill civil case. However, this case is a quasi-criminal matter, akin to a criminal case due to the severe punishment sought to be imposed on Dr. Duggal. The Washington Supreme Court has found and recognized the substantial liberty and property rights relating to a medical license in a disciplinary proceeding, and the heightened safeguards to protect the quasi-criminal defendant physician's corresponding due process rights. *See, e.g., Nguyen v. Dep't of Health*, 144 Wn.2d 516, 524-25, 531-32, 29 P.3d 689 (2001)(heightened due process rights and “clear,” “cogent,” “unequivocal,” and/or “convincing” evidentiary standards).¹

On the spectrum between civil and criminal, this case parallels a criminal case in scope because of the severe penal sanction, a professional incarceration. This David and Goliath case is a complete assault on Dr. Duggal's Constitutionally-protected liberty and property interests. Without an adjudicative hearing, the powerful State seeks to impose the most severe

¹“A professional license revocation proceeding has been determined to be 'quasi-criminal' in nature and, accordingly, entitled to the protections of due process.” *Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983). Black's Law Dictionary defines “quasi” as “[a]s if; almost as it were; analogous to.” *See* definition, Appendix A to this reply. The term is “quasi-criminal,” not “quasi-civil.”

professional punishment on Dr. Duggal, stripping away his career, professional license, his reputation, and his ability to make a living for his family.

Because this case has all the aspects of a criminal proceeding and no aspects of a civil one, and as exemplified in *Nguyen*, Dr. Duggal should receive parallel protections as a criminal defendant would receive under the U.S. and State Constitution and laws of the State, including heightened due process and the right to effective counsel. The State must strictly construe and adhere to the relevant procedures and rules, and contract language contained in the State-drafted proposed Order, and any ambiguities or uncertainties must be construed in favor of Dr. Duggal. Dr. Duggal is subject to losing his livelihood, liberty and his pursuit of happiness and the State makes a mockery of the judicial system by placing form over substance.

2. The State and Commission must honor Dr. Duggal’s right to withdraw his consent to the proposed Order and failing to do so violated his Constitutional due process rights by depriving him of an adjudicative hearing.

a) The following facts are undisputed.

Even though the State in its Statement of Issues refers to the proposed Order as “binding” and concludes, without any factual or legal support, that Dr. Duggal could not withdraw his consent to the proposed

Order two weeks before the Commission even considered it, the undisputed facts unequivocally illustrate that the proposed Order was not binding on its face when Dr. Duggal withdrew his consent. The undisputed and irrefutable facts are:

- The proposed Order was non-binding according to its unequivocal terms. The verifiable proposed contract states the following:
 - ¶1.8 (“This Agreed Order is *not binding unless* it is accepted and signed by the Commission”)(emphasis added), AP 3690, CP 17;
 - ¶1.9 (“*If* the Commission accepts this Agreed Order . . .”)(emphasis added), AP 3690, CP 17;
 - ¶1.11 (“*If* the Commission rejects this Agreed Order,” (emphasis added), AP 3690, CP 17;
 - ¶4.3 (“**Effective Date.** The *effective date* of this Agreed Order is the date the Adjudicative Clerk Office places the signed Agreed Order into the U.S. mail”)(bold and underlined emphasis in original) (emphasis added), AP 3780, CP 35;
 - ¶6 (“I understand that I will receive a signed copy *if* the Commission accepts this Agreed Order”) (emphasis added), AP 3709, CP 36.
- On January 16, 2014, Larry Berg, Staff Attorney for the Commission, characterized the non-binding nature of the proposed Order stating, “case has been *tentatively* settled according to the terms set forth in the attached” *proposed* Order. AR 3688 (emphasis added).
- Then, again, on January 16, 2014, Mr. Berg reiterates that “case has been *tentatively* settled according to the terms set forth in the attached” *proposed* Order (emphasis added). AP 3712.

- The version submitted to the Commission by the State was *not signed* by the State’s attorney. AP 3688-3710.
- When the Presiding Officer continued the hearing because of the Commission’s unavailability to consider proposed Order, the Presiding Officer referred to the “*proposed*” Order in four places. AP 3712. The Presiding Officer also noted that “[i]f the Commission approves” the proposed Order, the status conference will be stricken (emphasis added). AP 3712.²
- Then, less than two weeks after signing the proposed Order, and two weeks before the Commission considered it, Dr. Duggal unequivocally withdrew his consent to the proposed Order and requested a hearing on the merits by sending the withdrawal letter to the Commission dated January 28, 2014. AR 3714-15.

On its face, the proposed Order was unambiguously non-binding when Dr. Duggal withdrew his consent. *See also, e.g., Pac. Food Products Co. v. Mukai*, 196 Wn. 656, 663, 84 P.2d 131, 134-35 (1938)(“A definite term or condition of the writing was that until signed by both parties the written form did not constitute a binding contract. Respondents never signed the form of contract. The signature of appellant alone is not sufficient to make the writing a binding contract. The conditions prerequisite to a contract binding upon the respondents and the seller were never satisfied.”). At the time Dr. Duggal withdrew his consent, the State

² This unequivocally demonstrates that everyone recognized the non-binding and tentative nature of the proposed Order. In fact, the State used the terms “if,” “proposed,” “tentative,” “effective date” and “unless” no less than 14 times in the administrative record. Despite such obvious characterizations, now the State seeks to erroneously argue that proposed Order was binding and final to avoid a justified adjudicative hearing based on the true merits and substance of the case. Dr. Duggal has lost his property right, livelihood and liberty to practice medicine with an administrative gavel with no opportunity to defend himself.

had *not even* signed the proposed Order and the proposed Order was non-binding by its precise terms because the Commission had not yet considered it. There is absolutely no language in the proposed Order that prohibited Dr. Duggal from revoking his consent prior to the Commission acting on the proposed Order. In its response brief, the State essentially ignores and evades the plain reading of the proposed Order.

b) The State cites no statute, rule or facts prohibiting Dr. Duggal from withdrawing his consent to the proposed Order.

Initially, in Order No. 5 which rejected Dr. Duggal's withdrawal of consent, the Presiding Officer erroneously relied on WAC 246-11-270(1)(d) and WAC 246-11-270(1)(e) when he found that the Dr. Duggal had admitted the allegations against him when he signed the proposed Order and therefore could not withdraw his consent. AR 3720. As denoted in Dr. Duggal's opening brief, this regulation relates to a respondent's initial response to a charge, not to subsequent proceedings. In fact, Dr. Duggal has never expressly admitted guilt to any of the allegations.

In its response brief, the State does not really dispute the Presiding Officer's erroneous interpretation of WAC 246-11-270. Instead, the State characterizes the Presiding Officer's erroneous interpretation as harmless error. Respondent's Brief at 31. However, this error cannot be harmless

because it was primary authority cited by the Presiding Officer in Order No. 5 to decimate Dr. Duggal's heightened due process rights.

Faced with the undisputed and irrefutable facts, a non-binding proposed Order when Dr. Duggal withdrew his consent, and that the Presiding Officer misinterpreted WAC 246-11-270, the State in its response brief attempts to construct new arguments, suggesting that other laws and regulations, not mentioned in Order No. 5, purportedly prohibited Dr. Duggal from withdrawing his consent. These other laws and regulations are equally inapplicable to the question of whether Dr. Duggal had the right to withdraw his consent to the non-binding proposed Order.

The State initially cites RCW 34.05.060. Respondent's Brief at 23. This statute relates to informal settlements but contains no language relating to whether or not Dr. Duggal could withdraw his consent prior to the proposed Order becoming binding. The statute allows agencies to establish *by rule* specific procedures for attempting and executing informal settlement of matters. However, the State submits no written rule or other procedure that prohibited Dr. Duggal, in this quasi-criminal matter, from withdrawing his consent to the proposed Order, which at the time, was non-binding.

Next, the State cites RCW 18.130.098. Respondent's Brief at 23. This statute generally relates to settlement talks but is silent on the issue of

whether Dr. Duggal could withdraw his consent to the proposed Order at the time it is non-binding. This statute contains no prohibition relating to Dr. Duggal withdrawing his consent to a proposed settlement at the time it is in fact non-binding.

Next, the State misapplies WAC 246-11-360(5). Respondent's Brief at 23. First, WAC 246-11-360 contains no prohibition relating to whether or not a party may withdraw consent to a non-binding settlement. Second, subsection (5) only applies to a settlement that occurs prior to "the" settlement conference that is scheduled in accordance with subsection (1). Subsection (1) contemplates either (a) a "settlement conference" or (b) "other settlement processes." Subsection (5), cited by the State, only applies when a settlement conference has been scheduled in accordance with subsection (1). WAC 246-11-360(5) ("If a settlement offer has been made in writing to the respondent and it is signed and returned by the respondent to the board prior to *the* settlement conference,")(emphasis added). No such settlement conference was ever scheduled by the Commission. AR 674-677. Accordingly, subsection (5) does not apply to this case. Even if it did apply, there is no prohibition relating to Dr. Duggal withdrawing his consent while the proposed Order was not binding.

Next, the State argues that Dr. Duggal's withdrawal of consent was an improper ex-parte motion, citing RCW 34.05.455, RCW 34.05.437(3)

and WAC 246-11-380(6). Respondent's Brief at 24. Initially, under contract law and a plain reading of the terms in the proposed Order, Dr. Duggal did not need the Presiding Officer's permission to withdraw his consent to the non-binding proposed Order. Next, the Presiding Officer accepted Dr. Duggal's withdrawal letter relating to his withdrawal of consent and characterized it as a Motion to Withdraw Stipulation. AR 3718. Also, based on the record, it appears that the Commission, the Adjudicative Clerk's Office and the Attorney General's Office all received the withdrawal notice on February 4, 2014. AR 3714. Finally, the State and Presiding Officer converted Dr. Duggal's withdrawal letter into a motion – they created the purported procedural irregularity they are not attacking.

RCW 34.05.455 discusses the issues of ex-parte communications and provides for remedies relating to ex-parte communications. RCW 34.05.437(3) relates to the date-effectiveness of orders and appears to be irrelevant to the case issues. WAC 246-11-380(6) relates to the procedures relating to motions. The regulations do not authorize the Presiding Officer to strike the motion. But as noted above, the Presiding Officer accepted the withdrawal letter as a motion. After the State and Commission accepted Dr. Duggal's letter, they denied his constitutionally protected due process right to a hearing by rejecting his withdrawal. It is clear in the letter, in no

uncertain terms, that Dr. Duggal has withdrawn his consent and desperately intended to defend himself against the threat of a life-long sanction.

Next, the State cites *Lejeune v. Clallam Cnty.*, 64 Wn.App. 257, 270-72, 823 P.2d 1144 (1992), arguing that the Presiding Officer had no discretion to permit Dr. Duggal to withdraw his consent “[w]ith a rule that is clear on its face, providing no discretion to the Presiding Officer, there can be no error of law where the Presiding Officer merely follows his authority.” Respondent’s Brief at 24. However, there is no rule that is “clear on its face” that prohibited Dr. Duggal from withdrawing his consent.

Next, the State cites *Jones v. State Dept. of Health*, 170 Wn.2d 338, 357-58, 242 P.3d 825 (2010) for the proposition that Dr. Duggal could not withdraw his consent to the non-binding proposed Order. However, this case is clearly distinguishable because the defendant in that case did not withdraw his consent while the proposed settlement was non-binding.

The State cites no statute, regulation or case law that prohibited Dr. Duggal from withdrawing his consent to deny his constitutional right to an adjudicative hearing. The State provides no basis for condemning Dr. Duggal to a sentence of lifelong professional incarceration with no trial.

c) At a minimum, the Rule of Lenity applies and the statutes and regulations must be strictly construed.

At a minimum, even if a strained interpretation of the State’s cited law could be construed as impliedly prohibiting Dr. Duggal from withdrawing his consent, such a strained interpretation should be rejected under the Rule of Lenity.

Under the Rule of Lenity, when interpreting an ambiguous statute, the Court must adopt the interpretation most favorable to the criminal [and quasi-criminal] defendant. *See State v. McGee*, 122 Wn. 2d 783, 787, 864 P.2d 912, 914 (1993). The Rule of Lenity applies to both criminal and quasi-criminal statutes. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498–99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (“Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of Constitutionally protected rights”). The deciding factor is the nature of the sanction imposed. As a general rule, courts apply the Rule of Lenity to any statute imposing penal sanctions. *See, e.g., Kahler v. Kernes*, 42 Wn.App. 303, 308, 711 P.2d 1043 (1985) (“As it is a penal statute, although civil in form, we must adopt the interpretation most favorable to [defendant]”). “We are mindful of the maxim that penal statutes should be strictly

construed.” *United States v. Cook*, 384 U.S. 257, 262, 86 S.Ct. 1412, 16 L.Ed.2d 516 (1966).³

None of the procedural law cited by the State prohibits Dr. Duggal from withdrawing his consent to the proposed Order, which, on its face, was in fact non-binding, and which was considered to be only tentative and only proposed by the State and Presiding Officer. The only way the State can conceivably manufacture an argument to support its position is if the Court strains and reaches for an interpretation of the law to construe an implied prohibition. While no such interpretation is warranted, at a minimum, if such an interpretation is even plausible, the Rule of Lenity dictates that it should be rejected in favor of Dr. Duggal.

d) Prohibiting Dr. Duggal from having a hearing violated his heightened due process rights.

“Under the APA, a reviewing court may grant relief from an administrative agency’s ruling if, among other things, the order is in violation of the constitution either on its face or as applied. RCW 34.05.570(3).” *Nguyen* at 520-21. “[I]n the development of our liberty

³ A disciplinary proceeding is penal because it concerns punishing an offender, not compensating a victim; because the sanction is punitive in nature, and not remedial in any way, this is a penal case. *See In re Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952) (Professional discipline “is punitive, unavoidably so, despite the fact that it is not designed for that purpose”); *In re Disciplinary Proceeding Against Rentel*, 107 Wn.2d 276, 282, 729 P.2d 615 (1986); *In re Disciplinary Proceeding Against Selden*, 107 Wn.2d 246, 253, 728 P.2d 1036 (1986); *see In re Disciplinary Proceeding Against Haley*, 156 Wn. 2d 324, 347-49, 126 P.3d 1262, 1272-74 (2006) (“As a general rule, courts apply the rule of lenity to any statute imposing penal sanctions”).

insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." *Id.* at 523, quoting *Burdeau v. McDowell*, 256 U.S. 465, 477, 41 S.Ct. 574, 65 L.Ed. 1048 (1921) (Brandeis, J., dissenting).

The State (and Commission), in misconstruing and avoiding the facts and law, misses the point with respect to the all-important due process issue. Due process goes to the core of the dispute in this appeal. At the outset, it is undisputed that Dr. Duggal had a right to an adjudicative hearing when the charges were filed. *See Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn. 2d 516, 522, 29 P.3d 689, 691 (2001). When the Presiding Officer and the Commission refused to honor Dr. Duggal's withdrawal of consent, thereby denying his right to an adjudicative hearing, a constitutional due process violation occurred, resulting in a lifelong and permanent penal sanction (akin to a criminal sentence), the forever loss of his medical license without a hearing (trial).

The State attempts to argue that even if the Presiding Officer and Commission erroneously failed to acknowledge his withdrawal of consent, thereby improperly denying Dr. Duggal's Constitutional right to a hearing, it was no big deal because the procedure was good enough. *See* Respondent's Brief at 28-29. Despite a plain reading of the proposed Order

which states that it is non-binding, and despite that both the State and Presiding Officer treating the proposed Order as “tentative” and “proposed,” and despite that any reasonable and fair-minded person would understand and read the proposed Order to be non-binding at the time Dr. Duggal signed it and then withdrew his consent, and notwithstanding that no law prohibited Dr. Duggal from withdrawing his consent, the State misinterprets proposed Order and misinterprets and misapplies the law to erroneously argue that Dr. Duggal could not withdraw his consent, thereby depriving Dr. Duggal of a hearing (trial) and his constitutionally protected due process right.

Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interest within the meaning of due process clauses of the fifth and fourteenth amendments to the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The United States Supreme Court “consistently has held that some form of hearing is required before an individual is finally deprived of a property interest” and “[t]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” *Id.* at 333.

The State argues that the three *Mathews* due process factors are not

satisfied. The State is wrong. The Mathews factors are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). In the context of this quasi-criminal proceeding and due process requirements, the State has a heightened burden of proof. *See Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn. 2d 516, 531-32, 29 P.3d 689, 696 (2001) (“In summary, the administrative procedure, in addition to the subjective standard of care, increases the risk of error and in itself justifies a heightened burden of proof under the second *Mathews* factor”). Because of the profoundly important liberty and property interests at stake, and because the State is seeking to interpret and apply procedural strategies to deprive Dr. Duggal of a hearing and his medical license, the heightened due process protections in *Nguyen* should be extended to the interpretation and application of procedural rules and contract law as they relate to Dr. Duggal, the proposed Order and the withdrawal of his consent, as well as more substantive notions such as Dr. Duggal’s right to effective counsel

and right to a trial.

With respect to the first factor, with a flawed procedure, the State seeks to impose a life-long punitive sanction against Dr. Duggal, permanently stripping away his profession, liberty and livelihood for all time, with no remedial aspect to the sentence. The Washington Supreme Court has already held that a medical license is “profound” and deserving of a higher standard of proof, “clear and convincing,” when being considered for restriction or *revocation* by an adjudicative body. *Nguyen v. Dep't of Health*, 144 Wn.2d at 527-534. In assessing the level of due process, “[t]he more important the interest, the less tolerant we are as a civilized society that it be erroneously deprived.” *Id.* at 524. Unlike the doctor in *Nguyen* who’s due process rights were violated despite having a hearing, Dr. Duggal did not even have a hearing. Moreover, while Dr. *Nguyen* only faced a five-year suspension, Dr. Duggal faces a lifelong professional incarceration. There is no dispute that Dr. Duggal’s substantial liberty and property interests will be negatively impacted by the State’s proposed draconian and oppressive procedure which is not contained in any statute, regulation or case law.

With respect to the second factor, the State seeks to use a procedure that, while the proposed Order is not binding on its face and is not binding on the State, it is still binding on Dr. Duggal, and may be used

against him even if the Commission rejects it. And, such a purported one-sided procedure is not stated anywhere in a statute or a regulation or other written procedure. Also, it is blatantly unequal on its face. Essentially, the State's proposed procedure misleads the citizen into believing that he/she is entering a proposed Order which on its face is non-binding and from which the consent may be withdrawn before the Commission acts on it and permits enormous latitude for the State or Commission to accept or reject the offer but no similar right is offered to the quasi-criminal defendant. Such a context leads to a citizen unknowingly entering into a permanent binding agreement and *unequally* applying the proposed Order to Dr. Duggal but not to the State and Commission. The risk of deprivation is compounded by the fact that "[t]he risk of error is high in a proceeding seeking to revoke a medical license and the risk increases where the agency acts as investigator, prosecutor, and decision maker." *Id.* at 531.

Additionally, relating to the risk of an erroneous deprivation, "[s]uch concern is especially applicable to medical discipline where the charges stem from what could be an anomaly in an otherwise exemplary career." *Nguyen* at 531. Dr. Duggal, a private citizen, has cared for thousands of patients in his 20 year career and has never been in trouble with the law.

The risk of the deprivation can be remedied by simply interpreting the proposed Order literally (it is non-binding until the Commission acts on it and therefore, consent may be withdrawn) or adding a sentence to any future proposed Order, that it is binding on the signer notwithstanding that it is otherwise non-binding. Under this remedy, the signer is at least apprised of his/her legal rights from the time of signing the proposed Order.

With respect to the third factor, there is only a nominal burden on the State and Commission. The remedy is for the State to simply read and interpret the plain meaning of the words in the proposed Order, or to add a sentence to the proposed Order explaining the binding nature of the proposed Order, or simply rescheduling the hearing if a party withdraws his/her consent before the Commission acts on the proposed Order. Rescheduling the hearing is only a nominal act. In fact, the State and Commission postponed the hearing when the Commission was not able to meet to consider the proposed Order because of the Commission's scheduling issue. Importantly and materially, the Commission's own procedure dictates *if* the settlement is rejected, then the parties proceed with a hearing. There is no additional burden on the Commission except perhaps performing the perfunctory task of scheduling the hearing.

e) The proposed Order is not based on substantial evidence.

Despite the State's hollow conclusion that the proposed Order is supported by substantial evidence, the contrary is true. The proposed Order contains only unverified allegations. It is undisputed that the State submitted no evidence as to the credibility, veracity or viability of its claims.

The State's continued pursuit of the penal sentence is even more egregious because the State is well aware of three civil medical malpractice suits relating to the same administrative claimants. Under a lower burden of proof, by a preponderance of the evidence, the Superior Court summarily dismissed with prejudice Patient A's claims (no settlement). *See* Superior Court orders dated March 24, 2015 (CP 139-143), September 22, 2015 (CP 135-137), and October 14, 2015 (CP 129-130). The Superior Court also summarily dismissed with prejudice (no settlement) Patient D's civil lawsuit. *See* Superior Court order dated on June 19, 2015 (CP 132-133).⁴ The Superior Court imposed a spoliation sanction against Patient C for his failure to produce crucial evidence in his civil suit with evidence of a drug stash of thousands of pills (from various sources) in ziplock baggies. *See* Superior Court order dated December 12, 2014 (CP 145-147). It should also be importantly noted that, with respect

⁴ If the plaintiffs in these cases could not establish liability under a preponderance of the evidence standard, the State cannot meet its higher standard, clear and convincing evidence.

to the sexual misconduct (battery) allegation, the Superior Court specifically and summarily dismissed the claim. CP 135-136. These patients have had every financial incentive to exploit the State's process for their own money benefit.

(i) The Superior Courts' orders should be considered.

With respect to the admissibility of the Superior Court dismissals and spoliation order, the Superior Court specifically included them as part of the record. *See* Verbatim Report of Proceedings dated December 4, 2015 at 17:12-18.

The Superior Court dismissals and spoliation order are admissible in this proceeding under RCW 34.05.562 because they relate to the unlawfulness of the State's procedure and decision making process as outlined above. *See* RCW 34.05.562 (“(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding: . . . (b) Unlawfulness of procedure or of decision-making process;”); *see also* RCW 34.05.562 and RCW 34.05.554, under which the Court can remand the matter back to the agency relating to additional fact-finding in connection with new evidence. *See also Keenan v. State Employment Sec. Dep't*, 81 Wn.App. 391, 395-96, 914 P.2d 1191, 1193 (1996)(Citing

RCW 34.05.562(2))("Remand for consideration of additional evidence is permitted if new evidence is available which relates to the validity of the agency action and could not reasonably have been discovered until after the agency action, and remand will serve the interest of justice"); *see*, *Twin Bridge Marine Park, L.L.C. v. State, Dep't of Ecology*, 162 Wn.2d 825, 834, 175 P.3d 1050, 1054 (2008); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812, 818 (2005).⁵

In January, 2014, during the time period at issue, the Superior Courts' dismissals and spoliation order had not yet occurred. *See* Superior Court orders dated March 24, 2015 (CP 139-143), September 22, 2015 (CP 135-137), October 14, 2015 (CP 129-130), and June 19, 2015 (CP 132-133).

Additionally, there is no prejudice to the State relating to the inclusion of the Superior Court dispositions that Dr. Duggal is not liable relating to the claimants who are also part of the administrative case. *See Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn.App. 541, 568, 222 P.3d 1217, 1231-32 (2009)("The City does not attempt to justify its submission of the new materials but argues that the Association was not prejudiced thereby because PERC did not consider them. Where there has been no prejudice, no relief is warranted").

⁵ The State also cites RCW 34.05.566 on p16. This statute is irrelevant, it addresses costs relating to obtaining the agency record.

(ii) The Superior Courts' rulings largely exonerate Dr. Duggal.

Based on the foregoing, the disputed issues before the Commission have already and largely been resolved in Dr. Duggal's favor. The State quibbles with the inclusion of the Superior Court dismissals and spoliation order claiming that the civil cases and administrative case are based on different standards. Substantially and materially, a significant difference in the standards favors Dr. Duggal. That is, in the dismissed cases, the plaintiffs could not meet their lower evidentiary standard, preponderance of evidence, to avoid a summary dismissal of their claims.

The Superior Courts' orders are the only analyses which have been conducted as to the merits of the false and meritless allegations against Dr. Duggal. By dismissing the claims under a lower standard of proof, the Superior Courts have found that no misconduct occurred since the Courts did not need to reach the damages issue.

In light of the Superior Courts' dismissals and spoliation order, the State's continued pursuit of Dr. Duggal demonstrates a form over substance lynching strategy by the State. Justice dictates that the administrative case against Dr. Duggal should be dismissed because the Superior Courts have largely exonerated him. At a minimum, Dr. Duggal should be permitted to defend himself against the State's allegations (his Constitutionally

protected due process right) so he can be exonerated and return to his vocation and career as a practicing doctor who helps his patients. For almost 20 years, Dr. Duggal has practiced medicine without any liability against him.

3. By refusing Dr. Duggal's request for a short continuance, the Presiding Officer misinterpreted the law and was arbitrary and capricious.

The basis for Dr. Duggal's request for a short continuance arose from his need to change counsel due to the ineffective assistance of his prior counsel, and his new counsel needed time to prepare for the hearing.

a) Dr. Duggal has a right to effective counsel.

In response to Dr. Duggal's argument that his prior counsel was unprepared and failed to conduct any discovery prior to the adjudicative hearing, the State argues that Dr. Duggal is not entitled to effective assistance of counsel in this case, citing *Willapa Trading Co. v. Muscanto*, 45 Wn. App. 779, 785, 727 P.2d 687, 691 (1986). Respondent's Brief at 19. Unlike *Willapa*, which involved a civil dispute, quasi-criminal defendant Duggal faces an oppressive and permanent penal sanction, the loss of his medical license and his livelihood.

Dr. Duggal's counsel submits that he has found no published cases in Washington relating to whether a quasi-criminal defendant is entitled to effective assistance of counsel, and the issue appears to be one of first

impression in Washington. However, the Court can be guided by the thrust and intent of *Nguyen v. Department of Health, Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001). The *Nguyen* court held that Dr. Nguyen's professional license was a constitutionally protected property interest entitled to heightened due process protections. *See id.* at 523. Consequently and logically, the Court determined a higher standard of proof was required in a revocation proceeding to comport with constitutional requirements. *Id.* at 534. These heightened protections must apply to all aspects of the proceeding when the sanctions impose loss or restriction of a person's substantial liberty and property rights.

b) A short continuance and competent counsel would have made a difference.

The State argues that Dr. Duggal cannot show that prepared and competent counsel would have made a difference justifying a continuance. The State's argument lacks merit. One need only look at the Superior Courts' summary dismissals and limiting of the same claimant's civil cases against Dr. Duggal under a lower burden of proof to understand that if Dr. Duggal's prior counsel had defended this case with the same competence and vigor as Dr. Duggal's new counsel in the civil cases, he would have prevailed in this case.

c) The 180 day guideline is nominal.

The State had already caused the case schedule to exceed 180 days when it filed an amended charge and rescheduled the hearing. Also, even after the Presiding Officer denied the continuance based on the 180 day guideline, the Presiding Officer nevertheless continued the hearing when the Commission had a scheduling issue with considering the proposed Order.⁶

d) The Commission's inconvenience relating to rescheduling the hearing is a non-factor.

When compared to the severe and penal impact on Dr. Duggal relating to the loss of his medical license, his career and livelihood, any annoyance or inconvenience of the Commission relating to rescheduling the hearing is a non-factor. Also, importantly, this same procedure would be used when either Dr. Duggal withdrew his consent or if the Commission rejected the proposed Order.

II. CONCLUSION

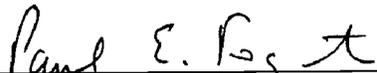
Dr. Duggal faces a life-long professional incarceration based on a proposed Order that was non-binding and tentative on its face at the time Dr. Duggal withdrew his consent to it. When the Presiding Officer and Commission refused to honor Dr. Duggal's withdrawal of consent and prohibited Dr. Duggal from exercising his right to proceed with a hearing,

⁶ The facts do not support the State's conclusion that Dr. Duggal used the proposed Order to surreptitiously obtain a continuance of the hearing. The hearing was continued before Dr. Duggal even withdrew his consent to the proposed Order.

they violated his heightened Constitutional due process rights and equal protection rights, misapplied and misinterpreted the statutory, administrative and contract law, and were arbitrary and capricious. The State continues to pursue the matter despite substantial evidence that Superior Courts have largely exonerated Dr. Duggal. Additionally, the Presiding Officer was arbitrary and capricious when he refused to grant Dr. Duggal's one and only request for a continuance based on his ineffective assistance of counsel. As a quasi-criminal facing the ultimate disciplinary, penal sanction, and consistent with the paramount Constitutional rights discussed in *Nguyen*, Dr. Duggal is entitled to heightened Constitutional rights in all aspects of this case, including effective assistance of counsel. This Court can grant relief to Dr. Duggal under RCW 34.05. 570(3)(a), (c), (d), (e), (f) and/or (i). Dr. Duggal respectfully requests that this Court protect his heightened due process rights, end the State's form-over-substance pursuit, find that he has a right to effective counsel, and remand the matter back to the Commission for an adjudicative hearing on the merits to avoid a manifest injustice.

Respectfully submitted this 20th day of April, 2016.

FOGARTY LAW GROUP PLLC


Paul E. Fogarty, WSBA No. 26929

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2016, I caused to be served a true and correct copy of **REPLY BRIEF OF APPELLANT NARINDER M. DUGGAL** by US MAIL and EMAIL to the following:

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APPENDIX A

BLACK'S
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Definitions of the Terms and Phrases of
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WEST PUBLISHING CO.

1990

Quarter section. The quarter of a section of land according to the divisions of the government survey, laid off by dividing the section into four equal parts by north-and-south and east-and-west lines, and containing 160 acres. A quarter of a square mile of land. Amount of land originally granted to homesteader.

Quarter session courts. Courts formerly established in some of the states, to be holden four times in the year, invested with criminal jurisdiction, usually of offenses less than felony, and sometimes with the charge of certain administrative matters, such as the care of public roads and bridges.

In England, all quarter session courts were abolished by The Courts Act of 1971, with the jurisdiction of such transferred to the Crown Court (*q.v.*).

Quarters of coverage. Social Security benefits are dependent on number of yearly quarters in which person made contributions (*i.e.* payments) into social security fund.

Quarto die post /kwórtow dáyiý pówst/. Lat. On the fourth day after. Appearance day, in the former English practice, the defendant being allowed four days, inclusive, from the return of the writ, to make his appearance.

Quash /kwósh/. To overthrow; to abate; to vacate; to annul; to make void; *e.g.* to quash an indictment.

Quasi /kwéysay/kwóziy/. Lat. As if; almost as it were; analogous to. This term is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are intrinsic and material differences between them. *Cannon v. Miller*, 22 Wash.2d 227, 155 P.2d 500, 503, 507. A term used to mark a resemblance, and supposes a difference between two objects. It is exclusively a term of classification. It implies that conception to which it serves as index is connected with conception with which comparison is instituted by strong superficial analogy or resemblance. Moreover it negatives idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other. *South Discount Foods, Inc. v. Retail Clerks Union Local 1552*, Com. Pl., 14 Ohio Misc. 188, 235 N.E.2d 143, 147. It is often prefixed to English words, implying mere appearance or want of reality or having some resemblance to given thing.

As to *quasi* Affinity; Contract; Corporation; Crime; Delict; Deposit; Derelict; Easement; Entail; Fee; In rem; Municipal corporation; Offense; Partner; Personality; Possession; Posthumous child; Purchase; Realty; Tenant; Tort; Traditio; Trustee; and Usufruct, see those titles.

Quasi admission. An act or utterance, usually extrajudicial, which creates an inconsistency with and discredits to a greater or lesser degree, present claim or other evidence of person creating the inconsistency, and person who enacted or uttered it may nevertheless disprove its correctness by introduction of other evidence. *Sutherland v. Davis*, 286 Ky. 743, 151 S.W.2d 1021, 1024.

Quasi contract. An obligation which law creates in absence of agreement; it is invoked by courts where there is unjust enrichment. *Andrews v. O'Grady*, 44 Misc.2d 28, 252 N.Y.S.2d 814, 817. Sometimes referred to as implied-in-law contracts (as a legal fiction) to distinguish them from implied-in-fact contracts (voluntary agreements inferred from the parties' conduct). Function of "quasi contract" is to raise obligation in law where in fact the parties made no promise, and it is not based on apparent intention of the parties. *Fink v. Goodson-Todman Enterprises, Limited*, 9 C.A.3d 996, 88 Cal.Rptr. 679, 690. See also Contract.

Quasi estoppel. This doctrine is properly invoked against a person asserting a claim inconsistent with a position previously taken by him, with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine. *Evans v. Idaho State Tax Commission*, 97 Idaho 148, 540 P.2d 810, 812.

"Equitable estoppel" and "estoppel in pais" are convertible terms embracing "quasi estoppel" and embody doctrine that one may not repudiate an act done or position assumed by him where such course would work injustice to another rightfully relying thereon. *Brown v. Corn Exchange Nat. Bank & Trust Co.*, 136 N.J.Eq. 430, 42 A.2d 474, 480.

See Equitable estoppel.

Quasi in rem jurisdiction. Type of jurisdiction of a court based on a person's interest in property within the jurisdiction of the court. Refers to proceedings that are brought against the defendant personally; yet it is the defendant's interest in the property that serves as the basis of the jurisdiction. There must be a connection involving minimum contact between the property and the subject matter of the action for a state to exercise quasi in rem jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683. Quasi in rem proceedings is generally defined as affecting only interest of particular persons in specific property and is distinguished from proceedings in rem which determine interests in specific property as against the whole world. *Avery v. Bender*, 124 Vt. 309, 204 A.2d 314, 317. See also Jurisdiction.

Quasi judicial. A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

Quasi judicial act. A judicial act performed by one not a judge. *State Tax Commission of Utah v. Katsis*, 90 Utah 406, 62 P.2d 120, 123.

Quasi-judicial power. The power of an administrative agency to adjudicate the rights of persons before it.

Quasi-legislative power. The power of an administrative agency to engage in rule-making.

Quasi-public corporation. See Corporation.

Quasi-traditio /kwéysay tradish(iy)ow/. Lat. In civil law, a term used to designate that a person is in the use

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