

57850-2

57850-2

80787-6

NO. 57850-2

Snohomish County No. 02-2-08819-6

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

MICHAEL S. JONES, R.Ph.,

Respondent/Plaintiff,

v.

STATE OF WASHINGTON AND ITS DEPARTMENT OF HEALTH,
WASHINGTON STATE BOARD OF PHARMACY; PHYLLIS WENE; and
STAN JEPPESEN, individually and as investigators for the Washington
State Board of Pharmacy, and DONALD WILLIAMS, individually and as
executive director of the Board of Pharmacy,

Petitioners/Defendants.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 NOV - 6 PM 12: 22

PETITIONERS' REPLY BRIEF

ROB MCKENNA
Attorney General

JOHN R. NICHOLSON
WSBA #30499
Assistant Attorney General
800 - 5th Avenue, Suite 2000
Seattle, WA 98104
206-464-7352

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. REPLY ARGUMENT.....1

 A. Mr. Jones’ Reliance on the Bare Allegations of His Complaint and Unsupported Conclusory Statements is Insufficient to Overcome the State’s Motion for Summary Judgment1

 B. Executive Director Williams is Entitled to Absolute Immunity as a Matter of Law.....2

 C. All Defendants Are Entitled to Qualified Immunity as a Matter of Law6

 1. Mr. Jones’ First Motion to Strike Should Be Denied, Because the State Raised all Issues Relating to the Defendants’ Qualified Immunity in the Trial Court.....6

 2. Mr. Jones’ Second Motion to Strike Should Be Denied, and the Court Should Decline to Review the Protective Order Entered by the Trial Court, Which Mr. Jones has Not Appealed.....10

 3. Mr. Jones Failed to Provide Evidence that Investigators Wene or Jeppesen Engaged in any Conduct that Violated a Clearly Established Right.....15

 4. Mr. Jones’ Admissions to the Pharmacy Board that He Committed Health and Safety Violations Demonstrate that There Was No Fabrication by the Defendants.....16

 5. Mr. Jones Has Neither Alleged Nor Provided Any Evidence of a Conspiracy.....18

 D. Mr. Jones’ Failure to Exhaust Administrative Remedies Bars His State Law Tort Causes of Action20

E. The Court Should Apply Judicial Estoppel to the Extent That Mr. Jones Contradicts the Declarations He Submitted to the Pharmacy Board, Which Establish the Reasonableness of the Summary Suspension22

F. The Trial Court’s Consideration of Hearsay Was Not Harmless24

III. CONCLUSION25

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Creighton</i> , 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).....	13
<i>Armendariz v. Penman</i> , 31 F.3d 860 (9 th Cir. 1994), partially reversed en banc, 75 F.3d 1311 (9 th Cir. 1996).....	8, 16, 17
<i>Brewster v. Board of Education of Lynwood Unified School Dist.</i> , 149 F.3d 971 (9 th Cir. 1998)	18
<i>Crawford-El v. Britton</i> , 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).....	13
<i>Franklin v. Fox</i> , 312 F.3d 423 (9 th Cir. 2002)	20
<i>Grimwood v. Puget Sound</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	2
<i>Hannum v. Friedt</i> , 88 Wn. App. 881, 947 P.2d 760 (1997).....	passim
<i>King v. Olympic Pipe Line</i> , 104 Wn. App. 338, 16 P.3d 45 (2000).....	11
<i>Laymon v. Dept. of Natural Resources</i> , 99 Wn. App. 518, 994 P.2d 232 (2000).....	20, 21
<i>Malley v. Briggs</i> , 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).....	17
<i>Maraziti v. First Interstate Bank of California</i> , 953 F.2d 520 (9 th Cir. 1992)	13
<i>Mathews v. Edridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	18

<i>Menotti v. City of Seattle</i> , 409 F.3d 1113 (9 th Cir. 2005)	3
<i>Mitchell v. Forsythe</i> , 472 US 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).....	13
<i>Mullinax v. McElhenney</i> , 817 F.2d 711, <i>on remand</i> 672 F. Supp. 1449 (N.D. Ga. 1987)	19
<i>Musso-Escude v. Edwards</i> , 101 Wn. App. 560, 4 P.3d 151 (2000).....	5
<i>Olsen v. Idaho State Bd. of Medicine</i> , 363 F.3d 916 (9 th Cir. 2004)	4, 5, 6
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992).....	14
<i>Saucier v. Katz</i> , 533 US 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).....	17
<i>Shields v. Morgan Financial, Inc.</i> , 130 Wn. App. 750, 125 P.3d 164 (2005).....	11
<i>Slavin v. Curry</i> , 574 F.2d 1256 (5 th Cir. 1978), <i>modified on other grounds</i> , 583 F.2d 779 (1978), <i>overruled on other grounds</i> , <i>Sparks v. Duval</i> <i>County Ranch, Co., Inc.</i> , 604 F.2d 976 (5 th Cir. 1979).....	19, 20
<i>Trevino v. Gates</i> , 99 F.3d 911 (9 th Cir. 1996)	15

Statutes

42 USC § 1983	passim
RCW 18.130.050 (7).....	1, 18
RCW 43.70.075	12
RCW 70.02, <i>et. seq</i>	13

WAC 246-11-330..... 21

Rules

CR 12 1

CR 56 1

CR 56 (f) 9, 10

I. INTRODUCTION

Recognizing the defendants' absolute and qualified immunity is imperative in this case, because pharmacy regulators must be allowed to act independently and without fearing liability when they perform their duty of ensuring that pharmacists in Washington remain compliant with health and safety laws. The importance of these immunities could not be more vividly illustrated than by the health and safety violations Mr. Jones admitted to the Pharmacy Board in August of 1999. These violations demonstrate the reasonableness of the Board's decision to invoke a summary suspension procedure authorized in RCW 18.130.050 (7), which provides prompt post-deprivation remedies that are subject to administrative and appellate review. The trial court's decision denying immunity to the defendants and holding that Mr. Jones' state law tort causes of action are not precluded by his decision not to pursue available administrative remedies is error and must be reversed.

II. REPLY ARGUMENT

A. **Mr. Jones' Reliance on the Bare Allegations of His Complaint and Unsupported Conclusory Statements is Insufficient to Overcome the State's Motion for Summary Judgment**

This court has accepted review of an order denying a motion for summary judgment under CR 56, not an order denying a motion for judgment on the pleadings under CR 12. Yet, Mr. Jones relies on mere

allegations in his Amended Complaint or unsupported conclusory statements for many of the basic factual assertions he claims as support for the trial court's decision. However, as the Commissioner noted in accepting discretionary review of this case, mere allegations do not create genuine issues of material fact on summary judgment. *Grimwood v. Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). "The 'facts' required by CR 56 (e) are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient...Likewise, conclusory statements of fact will not suffice." *Id.* (citations omitted). Mr. Jones' reliance on allegations from the Amended Complaint and other conclusory statements without evidentiary support is improper. The specific areas where Mr. Jones' arguments lack any evidentiary support are highlighted below.

B. Executive Director Williams is Entitled to Absolute Immunity as a Matter of Law

Mr. Jones fails to demonstrate the existence of any evidence to show that Executive Director Williams engaged in conduct other than making a decision to file a motion for summary suspension and statement of charges, conduct for which he is entitled to absolute immunity. Mr. Jones' declaration makes clear that the only defendants present at the inspections of his pharmacy were Investigators Wene and Jeppesen, not Executive Director Williams. CP at 212 – 218. But, to argue that Mr.

Williams was involved in some other “investigative misconduct,” Mr. Jones rests on unsupported allegations in his complaint that “Williams knew of and directed Jeppesen’s and Wene’s actions.”¹ Jones’ Brief at 16-17. These allegations, which are not supported by evidence, are insufficient to demonstrate an issue of fact on summary judgment.

In *Hannum v. Friedt*, 88 Wn. App. 881, 947 P.2d 760 (1997), the court held that the Director of DOL was absolutely immune for initiating disciplinary proceedings against the plaintiff. *Id.* at 888. Mr. Jones attempts to distinguish this case, by arguing that there the statutory scheme provided the Director of DOL the authority to summarily suspend the plaintiff’s license without having to refer the matter to a quasi-judicial authority, such as the Pharmacy Board in this case, and that she was conferred immunity based on her judicial, rather than prosecutorial, authority. Jones’ Brief at 23 – 26. Mr. Jones also argues, again without any evidence, that Executive Director Williams’ role in this case was merely referring the disciplinary paperwork regarding Mr. Jones to an Assistant Attorney General (AAG) for prosecution, and that Williams’

¹ There is no vicarious liability under 42 USC § 1983, and in order to prove supervisory liability the plaintiff must provide evidence that a supervisor played some role in the constitutional deprivation. *See, e.g. Menotti v. City of Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005). Here, there is no evidence that Executive Director Williams personally participated in the inspections or investigation of Mr. Jones’ pharmacy in any way, nor is there evidence that he supervised the investigators or directed them to deprive Mr. Jones of any constitutional right.

conduct is therefore not prosecutorial in nature. *Id.* at 21 – 23. Looking past the fact that Mr. Jones’ contention is once again unsupported by evidence in the record, Mr. Jones’ arguments ignore the facts and holding of *Hannum* and *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916 (9th Cir. 2004). Both of these cases establish Williams’ immunity, even under the circumstances suggested by Mr. Jones’ unsupported allegations.

In *Hannum*, the court conferred absolute immunity on the Director of DOL for “initiating an administrative adjudication when she signed the original and amended statement of charges and notice and order of summary suspension” which the court held were “functions analogous to those of a prosecutor.” *Id.* at 888. Thus, it conferred absolute immunity based on the Director’s prosecutorial, not judicial, conduct.

Furthermore, *Hannum* illustrates that even if the scenario alleged by Mr. Jones – that Williams referred Mr. Jones’ case to an AAG for prosecution – were true, Williams would nevertheless be entitled to absolute immunity. The Director of DOL was not the only defendant held to be absolutely immune to the plaintiff’s claims in *Hannum*. An administrator at DOL named Hamilton, who did not have the statutory authority to effect a summary suspension of the plaintiff’s license as the Director of DOL did, was also afforded absolute *prosecutorial* immunity where she had simply made a recommendation that a summary suspension

order be issued and that a disciplinary action against the plaintiff be filed. *Id.* at 889. If Hamilton, an administrator who had no authority under the statute to take administrative action herself, was entitled to absolute immunity for making a recommendation to the Director to prosecute, then Executive Director Williams is also immune, even if his role was simply referring the disciplinary paperwork to an AAG for prosecution, as Mr. Jones contends.

Mr. Jones' arguments against Executive Director Williams' prosecutorial immunity disregard the well-settled "prosecutorial function" test.² Whether an official has statutory authority to effect a summary suspension without first petitioning a judicial body, or whether the official himself signed disciplinary paperwork are not dispositive of the official's entitlement to absolute immunity. Thus, Mr. Jones fails even to attempt to distinguish *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916 (9th Cir. 2004), in which the Ninth Circuit conferred absolute immunity on both the Executive Director of the Idaho Medical Board *and* its counsel in a § 1983 procedural due process action premised on the initiation of disciplinary

² In determining whether absolute immunity applies, the court considers the nature of the function performed, not the identity of the actor who performed it. *Musso-Escude v. Edwards*, 101 Wn. App. 560, 573, 4 P.3d 151 (2000). The decision to initiate disciplinary proceedings has been recognized as a prosecutorial function for which an agency official is entitled to absolute immunity. *Hannum*, 88 Wn. App. at 888-89.

proceedings against the plaintiff, an Idaho physician's assistant. *Id.* at 925-26.³

C. All Defendants Are Entitled to Qualified Immunity as a Matter of Law

Investigators Wene and Jeppesen did not engage in any conduct that implicated a procedural due process right and are therefore qualifiedly immune. Furthermore, all of the defendants are qualifiedly immune, because Mr. Jones admitted to serious health and safety violations. A reasonable public official could have believed that an emergency justifying the legislatively authorized summary suspension procedure did not violate his right to procedural due process in this situation.

1. Mr. Jones' First Motion to Strike Should Be Denied, Because the State Raised all Issues Relating to the Defendants' Qualified Immunity in the Trial Court

Mr. Jones' assertion that issues relating to the individual defendants' qualified immunity were not raised in the trial court is belied by the record. The issues Mr. Jones claims were not raised below – whether there is any evidence that the defendants engaged in the conduct

³ Like Mr. Jones, the plaintiff in *Olsen* chose not to exhaust the available administrative remedies, voluntarily dismissing her administrative appeal and electing instead to file a lawsuit. *Olsen*, 363 F.3d at 928. In affirming the trial court's finding of absolute immunity, the Ninth Circuit disapproved of the plaintiff's decision to forgo the administrative procedures available, noting that this "litigation strategy is...in direct contravention of the policy behind absolute immunity: Absolute immunity aids in the 'discouragement of collateral attacks, thereby helping to establish appellate procedures as the standard system for correcting judicial error.'" *Id.* at 928-29 (quoting *Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)).

he alleges and whether his right to a pre-deprivation hearing was clearly established – are the essential questions that are necessarily raised in *any* motion for summary judgment that is premised on qualified immunity. Further, the parties’ summary judgment and reconsideration memoranda, which were considered by the trial court, plainly briefed these issues.

The State’s motion for summary judgment indicated that one of the issues before the trial court was simply, “Must All Mr. Jones’ Claims Be Dismissed Because the Defendants are Entitled to Absolute, Statutory, and/or Qualified Immunity?” CP at 440. In briefing qualified immunity, both the State’s summary judgment motion and reply brief set out the standard to be applied by a court considering the issue, which places the burden on the plaintiff to show that the defendant committed a constitutional violation that was “clearly established” at the time of the events in question. CP at 153 – 159, 450 – 51. The State also briefed the summary judgment standard, which requires the plaintiff, as the non-moving party, to present admissible evidence to demonstrate a genuine issue of fact and not to rely on unsupported or conclusory allegations. CP at 155 – 56, 441 – 42. Mr. Jones himself devoted an entire section of his summary judgment opposition brief to argue that his right to a pre-deprivation hearing was clearly established. CP at 201.

Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994), partially reversed en banc, 75 F.3d 1311 (9th Cir. 1996), a case Mr. Jones heavily relied on in his summary judgment opposition brief⁴, reflects that one of the essential questions for the court to consider in a summary judgment motion based on qualified immunity is: “Is There A Genuine Issue As To Whether Defendants Engaged in the Conduct Alleged By Plaintiffs?” *Armendariz*, 31 F.3d at 870. Yet, in his opposition to the summary judgment motion, Mr. Jones admittedly relied on conclusory allegations, incorrectly arguing that “plaintiff’s allegation that the Defendants knew no emergency existed is sufficient to defeat a motion for summary judgment based on qualified immunity.” CP at 206 (emphasis added). The State then argued in its reply brief that Mr. Jones had failed to meet his burden by failing to present any evidence to support these allegations:

Mr. Jones argues that his mere allegation that the defendants knew no emergency existed, without any supporting evidence, is sufficient to overcome the defendants’ summary judgment motion on his § 1983 due process claim. Plaintiff’s Response at 20:9-13. This argument is completely inconsistent with the summary judgment and qualified immunity standards, which place the burden on Mr. Jones to demonstrate evidence of a genuine issue of fact that the defendants violated a clearly established right. Mr. Jones has failed to meet his burden, because he has not shown that the right to a predeprivation hearing was clearly established under the facts of this case

⁴ CP at 206-208.

and has not presented any evidence that the defendants engaged in the unconstitutional conduct he alleges.

CP at 153-54. The State continued its argument:

In addition, there is no evidence to support the most basic facts that Mr. Jones alleges against investigators Wene or Jeppesen in support of his § 1983 claim. Mr. Jones' § 1983 claim is premised on the allegation that "Wene, Jeppesen, and Williams violated Jones' rights by initiating disciplinary proceedings..." First Amended Complaint, ¶ 4.2. However, the unrebutted testimony of Mr. Williams establishes that he, and not Wene or Williams, initiated the disciplinary proceedings by filing the Statement of Charges against Mr. Jones and requesting that the Board take summary action. Williams Decl., ¶¶ 8-9. There is simply no evidence that Wene or Jeppesen even had the authority to initiate these proceedings.

CP at 157-58.

This case has been pending since 2002, and Mr. Jones was afforded the ability to conduct discovery.⁵ Mr. Jones had the opportunity to submit whatever evidence existed to show that the investigators somehow deprived him of his procedural due process rights. Had Mr. Jones believed that additional discovery was necessary to obtain the

⁵ The State had moved for summary judgment once previously in November of 2003, and Mr. Jones moved for and was granted a continuance under CR 56 (f) at that time. The State has filed a supplemental designation of clerk's papers designating the order granting this continuance and several other documents filed in the trial court, but the page numbers are not yet available. A copy of the order is therefore attached to this brief as Appendix A. The State will submit a final copy of this brief, with corrected page numbers, once the Snohomish County Superior Court clerk has issued the index for these supplemental clerk's papers.

Mr. Jones made no similar CR 56 (f) motion when the State brought a summary judgment motion once again in late 2005, which is the motion now being reviewed by this court.

needed evidence to respond to the State's motion, he could have moved for a continuance of the motion pursuant to CR 56 (f). Mr. Jones did not move for a continuance or otherwise object to consideration of any of the above arguments. The summary judgment order, which was drafted by Mr. Jones' counsel, plainly reflects that the court considered all of the above materials and arguments. CP at 128-29. Thus, Mr. Jones' motion to strike on grounds that the State's qualified immunity arguments were not presented to the trial court must be denied.

2. Mr. Jones' Second Motion to Strike Should Be Denied, and the Court Should Decline to Review the Protective Order Entered by the Trial Court, Which Mr. Jones has Not Appealed

Mr. Jones next argues that the State's references to "out-of-state cases involving pharmacy misconduct" should be stricken, because the trial court entered a protective order with respect to several of Mr. Jones' discovery requests. Jones Brief at 1. Mr. Jones further asks that the court "order the Petitioners to produce the discovery previously requested by Respondent." Jones' Brief at 43.

Mr. Jones has never sought discretionary review of the trial court's order regarding this discovery, which was entered on October 7, 2004, over a year and three months before the trial court considered the

summary judgment motion at issue.⁶ Consequently, this decision is not properly before the court, and the court should decline to review it. If the court does review this issue, it should affirm the trial court's order, because Mr. Jones has not established an abuse of discretion. In any case, the court should deny Mr. Jones' motion to strike any of the legal authorities relied on by the State, because there is no relationship between the discovery Mr. Jones requested and the validity of these authorities.

The standard of review for a trial court's grant of a protective order and for controlling discovery is abuse of discretion. *Shields v. Morgan Financial, Inc.*, 130 Wn. App. 750, 759, 125 P.3d 164 (2005). A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons. *King v. Olympic Pipe Line*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000). The few discovery requests by Mr. Jones to which the State objected were extremely burdensome and called for information and records that were confidential, and consequently would have required extensive and laborious redaction. The interrogatories at issue called for the State to identify all instances in which the Board had previously summarily suspended a pharmacy license

⁶ The court considered the State's motion for a protective order and Mr. Jones' motion to compel, both of which related to these discovery requests, at the same time on September 21, 2004. App. E. These motions were initially decided in Mr. Jones' favor by a Pro Tem Commissioner. App. E. However, on October 7, 2004, Judge Linda Krese granted the State's motion to revise the Commissioner's rulings, effectively reversing the Commissioner's decisions on both of these motions. App. G.

or a pharmacist's license, the date of the summary suspensions, the identity of the pharmacists and pharmacies involved, a detailed description of the allegations involved, as well as other information. App. D. Other requests demanded that the State identify all disciplinary actions taken against pharmacies for the preceding ten years, the identity of the pharmacies involved, detailed descriptions of the allegations involved, and other information. App. D. The requests also demanded that documents related to all of these disciplinary proceedings be produced. App. D.

The State agreed to produce the disciplinary records regarding Mr. Jones, but sought a protective order with respect to the records of other pharmacists, primarily because of the expense involved in responding. Steve Hodgson, a records custodian from the Department of Health, submitted a declaration in support of the State's motion for a protective order establishing that Pharmacy Board records were not organized according to the criteria delineated in these discovery requests. App. D. A hand search through years of Pharmacy Board disciplinary records, requiring approximately 80-90 hours of work, would have been required in order to respond to them. App. D. Then, because of confidentiality provisions relating to whistleblower complaints⁷ and health care records⁸,

⁷ RCW 43.70.075 provides the identities of individuals who complain, in good faith, to the department of health about the improper quality of care by a health care provider or health care facility is confidential.

substantial redactions to the documents requested would have been required. App. D. The trial court did not abuse its discretion in entering a protective order based on this enormous burden and cost.

Because they are immunities from suit and not mere defenses to liability, absolute and qualified immunity should be resolved at the earliest possible stage in the litigation, so that a defendant who is properly entitled to immunity will not be subjected to the costs of litigation. *Mitchell v. Forsythe*, 472 US 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Thus, while some limited discovery may be appropriate, in the discretion of the trial court, prior to a decision on a summary judgment motion based on qualified immunity, if the claims against the defendant are premised on “actions that a reasonable officer could have believed lawful...then [the defendant] is entitled to dismissal prior to discovery.” See *Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (emphasis added); see also *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998); *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 525 (9th Cir. 1992).

Consistent with this principle, the State argued that Mr. Jones’ discovery was improper, because only the Pharmacy Board, which is entitled to absolute immunity for its quasi-judicial conduct in this case,

⁸ Patients’ health care records are confidential under several statutes, including RCW 70.02, *et. seq.*

had the authority to summarily suspend or otherwise deprive Mr. Jones of his pharmacy license. App C.⁹ Investigators Wene and Jeppesen, who are the only individual defendants in this case who would not be entitled to quasi-judicial absolute immunity, do not have this authority. They are consequently entitled to qualified immunity, because their conduct does not implicate the right to procedural due process. Indeed, in *Hannum*, the Court of Appeals held that investigative conduct did not give rise to a procedural due process violation. *Hannum*, 88 Wn. App. at 890. Thus, the defendants' entitlement to immunity is properly decided before discovery, such as that propounded by Mr. Jones.

Last, Mr. Jones fails to even explain how the discovery requests he made are connected to what he characterizes as "out of state cases involving pharmacy misconduct" cited by the State. The Pharmacy Board's history with respect to summary suspensions or other disciplinary actions is not relevant to the court's determination of whether pursuing a summary suspension of Mr. Jones' licenses was objectively reasonable in this case. Qualified immunity requires the court to apply an objective, rather than a subjective, test. *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992). Thus, when the court considers whether a right is

⁹ Mr. Jones has designated the State's Response in Opposition to Mr. Jones' Motion to Compel in a supplemental designation of clerk's papers. Because this portion of the clerk's papers are not yet available, the State's Response in Opposition to Mr. Jones' Motion to Compel is attached as Appendix C to this Reply Brief.

clearly established, it surveys the “legal landscape.” *See, e.g., Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996). It does not engage in an assessment of the defendant’s past conduct to judge the reasonableness of his or her conduct in the case at bar. The State relied on reported legal authorities, not on the Board’s history, to establish that the violations that Mr. Jones admitted were sufficiently emergent that a reasonable public official could believe that summary action was justified. Thus, Mr. Jones’ motion to strike portions of the State’s arguments should be denied.

3. Mr. Jones Failed to Provide Evidence that Investigators Wene or Jeppesen Engaged in any Conduct that Violated a Clearly Established Right

In *Hannum*, the court found that where the involvement of one of the defendants, Gerrish, was limited to investigating the plaintiff, his conduct did not amount to a violation of the plaintiff’s right to procedural due process. *Hannum*, 88 Wn. App. at 890. Similarly, Investigators Wene and Jeppesen’s conduct in this case is strictly investigative and does not implicate any deprivation of Mr. Jones’ right to procedural due process.

Mr. Jones argues that Investigators Wene and Jeppesen can be liable for a procedural due process violation based on a litany of conclusory allegations, which he characterizes as “wrongdoing.” Jones’ Brief at 31 – 32. However, as the court in *Hannum* noted, “The proper inquiry is whether [an investigator], by investigating [the plaintiff]...,

deprived [the plaintiff] of property without due process of law.” *Id.* The court concluded that an investigation, as opposed to the initiation of disciplinary proceedings, did not deprive the plaintiff of his property without due process. *Id.* All of the unsupported allegations of “wrongdoing” Mr. Jones lists against Investigators Wene and Jeppesen involve their investigation of his pharmacy, not the deprivation of any procedural due process right. Thus, for the same reasons that the plaintiff’s claim against the investigator in *Hannum* failed, so too does Mr. Jones’ claim against Wene and Jeppesen here.

4. Mr. Jones’ Admissions to the Pharmacy Board that He Committed Health and Safety Violations Demonstrate that There Was No Fabrication by the Defendants

Mr. Jones also suggests, again without any evidence, that the defendants “fabricated” the emergency in this case, comparing it to the fabricated emergencies in *Armendariz*, where two San Bernardino city officials participated in formulating policies under which the city would fabricate emergencies in order to close down the plaintiffs’ properties. *Armendariz*, 31 F.3d at 871.¹⁰ However, given Mr. Jones’ many

¹⁰ In *Armendariz*, several other defendants had initially been sued by the plaintiffs. However, the Ninth Circuit held that dismissal of the plaintiffs’ § 1983 due process claims against these other defendants was required, because there was no evidence that these defendants had been involved in implementing the unconstitutional policies. *Armendariz*, 31 F.3d at 871.

admissions of health and safety violations, there is no evidence of fabrication.

Indeed, rather than providing evidence of fabrication of an emergency as in *Armendariz*, Mr. Jones instead argues that “the existence – or non-existence – of an emergency remains a question of fact.” Jones’ Brief at 40. However, Mr. Jones misstates the issue, for whether an emergency actually existed is not the relevant inquiry to be made by a court deciding qualified immunity. Rather, the central dispositive inquiry in the qualified immunity analysis is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he was confronted.” *Saucier v. Katz*, 533 US 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Thus, “[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made.” *Id.* at 205. The standard, then, as properly articulated, dictates that if *any* reasonable public official could have believed that requesting that the Board grant a summary suspension was lawful, qualified immunity must apply. *See Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (holding that “if officers of reasonable competence could disagree on this issue, immunity should be recognized.”).

Particularly in the procedural due process context, where the process due in any situation depends on the weighing of the specific facts

of each case according to the ad-hoc balancing test articulated in *Mathews v. Edridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), qualified immunity will usually apply. *Brewster v. Board of Education of Lynwood Unified School Dist.*, 149 F.3d 971, 983 (9th Cir. 1998). In light of the many review procedures available under the statute¹¹ and the admissions by Mr. Jones of committing serious health and safety violations, a reasonable public official performing this balancing test could have believed that invoking the summary suspension procedure was lawful.

5. Mr. Jones Has Neither Alleged Nor Provided Any Evidence of a Conspiracy

Apparently conceding that there is no evidence that the investigators engaged in any conduct that deprived him of a procedural due process interest, Mr. Jones now argues that the investigators engaged in a conspiracy to deprive him of his constitutional rights. Mr. Jones never argued this theory in any of his summary judgment briefing.¹²

¹¹ The statute authorizing the summary suspension in this case, RCW 18.130.050 (7), is constitutional on its face, and Mr. Jones has never argued to the contrary. Even when the summary suspension procedure is invoked, the statute affords a licensee multiple opportunities for post-deprivation hearings. Indeed, Mr. Jones admits that a full three-member panel of the Pharmacy Board did afford him a hearing on his motion to stay the summary suspension just twenty-one (21) days following entry of the order. By agreeing to a stipulated order, Mr. Jones waived the additional post-deprivation remedies that were also available.

¹² Mr. Jones raised the issue of a conspiracy under 42 USC § 1983 for the first time when he responded to the State's motion to reconsider the trial court's partial denial of summary judgment. CP at 47 – 48.

Indeed, Mr. Jones' Amended Complaint does not allege a § 1983 conspiracy claim.

Even if the court looks past Mr. Jones' failure to plead any conspiracy, his failure to provide any evidence of one to meet his burden in responding to the State's motion for summary judgment is fatal to this contention. The fact that the decision before the court is an order on a motion for summary judgment, and not a motion on the pleadings, coupled with the absence of any evidence of a conspiracy obviously distinguishes this case from the two cases Mr. Jones relies on to argue this new conspiracy theory, *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1978), *modified on other grounds*, 583 F.2d 779 (1978), *overruled on other grounds*, *Sparks v. Duval County Ranch, Co., Inc.*, 604 F.2d 976 (5th Cir. 1979), and *Mullinax v. McElhenney*, 817 F.2d 711¹³, *on remand* 672 F. Supp. 1449 (N.D. Ga. 1987).

An allegation of conspiracy, without more, does not deprive a defendant of qualified immunity, and the plaintiff must demonstrate evidence of a conspiracy to proceed on such a theory. *See, e.g., Franklin*

¹³ In *Mullinax*, the plaintiff, who was a paralegal, alleged that district attorneys, in order to impede the defense of her client, both directly violated and conspired to violate her constitutional liberty and property interests. *Mullinax*, 817 F.2d at 712-714. Following an appeal, on remand the district court denied the district attorneys' summary judgment motion, because it found that the plaintiff "presented enough evidence to create a question of fact as to whether defendants actually engaged in the acts or conspired to do so as alleged by plaintiff." *Mullinax*, 672 F.Supp. at 1452. In contrast, here Mr. Jones has offered no evidence that Williams, Wene, or Jeppesen entered into a conspiracy.

v. *Fox*, 312 F.3d 423, 441-45 (9th Cir. 2002) (granting summary judgment on § 1983 claims against assistant district attorneys and jail officer who allegedly conspired with plaintiff's daughter to implicate him in first-degree murder conviction, because qualified immunity applied where no evidence of conspiracy was shown). In this case, the State made a motion for summary judgment, not a motion to dismiss on the pleadings as in *Slavin*, and the trial court conducted a full hearing on the motion. The standard the court employs when deciding a motion for summary judgment is different from the standard it applies when deciding a motion to dismiss on the pleadings. Mr. Jones presented no evidence of either unconstitutional conduct by the investigators or the existence of a conspiracy among the defendants.

D. Mr. Jones' Failure to Exhaust Administrative Remedies Bars His State Law Tort Causes of Action

Mr. Jones focuses on his personal financial situation, in particular his loss of a franchise and lease, to argue that his failure to exhaust the administrative process that the Pharmacy Board afforded to him and his agreement to the suspensions of his licenses do not preclude his state law tort claims. *Laymon v. Dept. of Natural Resources*, 99 Wn. App. 518, 994 P.2d 232 (2000). However, in *Laymon*, the summary-stop work order issued by DNR caused a similar economic hardship on the plaintiff land

developer, since the financial backers of the development withdrew from the project after they learned about DNR's actions and the terms of the resulting required management plan. *Id.* at 523. Thus, Mr. Jones' financial hardships do not excuse him from the obligation of exhausting available administrative remedies.

Furthermore, Mr. Jones' suggestion that the State somehow prevented him from having a prompt adjudicative hearing is disingenuous. Mr. Jones could have demanded a "prompt hearing," which would have been required to occur within twenty days of entry of the summary suspension order. WAC 246-11-330. Mr. Jones elected to waive his right to this "prompt hearing," opting instead to contest the order of summary suspension by written motion. CP at 398. Even so, the Board afforded Mr. Jones a full hearing on his motion to stay the summary suspension just 21 days after the summary suspension order was entered.¹⁴ Any delay Mr. Jones complains about with respect to receiving a "prompt hearing" on the Statement of Charges was self-inflicted, because he waived his right to it.

¹⁴ The summary suspension order was entered on August 17, 1999. CP at 320-26. A full three-member panel of the Board decided Mr. Jones' motion to stay the summary suspension 21 days later on September 7, 1999. CP at 354-58.

E. The Court Should Apply Judicial Estoppel to the Extent That Mr. Jones Contradicts the Declarations He Submitted to the Pharmacy Board, Which Establish the Reasonableness of the Summary Suspension

Mr. Jones argues there was no contradiction between his August 1999 declaration to the Pharmacy Board and his more recent declaration in response to the State's motion for summary judgment. This misstates the record. In Mr. Jones' declaration opposing the State's motion for summary judgment, he stated that he "had contacted officials with the QS-1 computer system and they had turned on the part of the program which processed medical conditions" and that "[t]his was corrected by the second inspection" on August 10, 1999. CP at 214 (emphasis added). However, in August 1999, when Mr. Jones filed a declaration with the Pharmacy Board in an attempt to persuade it to stay the summary suspension, he testified that "while the inspectors were at lunch on August 10th, I contacted my computer vendor ... [and] was informed ... that these features were left off by the company ..." CP at 341. While attempting to minimize this blatant inconsistency, Mr. Jones now concedes that at the August 1999 inspection, his automated records system was not properly functioning and that he failed to attempt to correct this problem until then.

Contrary to his assertion, Mr. Jones made other contradictory statements to avoid summary judgment. For example, in his declaration

opposing summary judgment, Mr. Jones also contradicted his earlier admissions to the Pharmacy Board that he could not produce proof of authorizations by patients to dispense drugs in non-child resistant caps (CRC's).¹⁵ He also contradicted his earlier admission to the Board that he still had outdated prescription items on his shelves at the second inspection of his pharmacy in August of 1999.¹⁶ The State summarized these numerous contradictory statements in its summary judgment reply brief. CP at 150-52.

While now glossing over these contradictions, Mr. Jones apparently concedes that judicial estoppel does apply to this situation and offers no legal authorities to the contrary. If the court accepts the facts as set forth in the August 1999 declarations to the Pharmacy Board by Mr. Jones and his attorney, which reflect his own statements about the condition of his pharmacy at that time, the court must conclude that a

¹⁵ In his declaration opposing summary judgment, Mr. Jones stated that he "did have records for authorization to use child resistant caps," CP at 214. This statement contradicts Mr. Jones' statement to the Pharmacy Board in his August 1999 declaration that his "records [regarding non-CRC authorizations] may not have been organized for ease of reference," CP at 342. It further contradicts an admission made in a declaration by Mr. Jones' attorney to the Pharmacy Board in August of 1999 that Mr. Jones' "record-keeping system did not allow for one to readily verify specific signatures." CP at 349.

¹⁶ In his declaration opposing summary judgment, Mr. Jones stated that at the August 1999 inspection he "did not have outdated medications on the shelf." CP at 214. Again, this testimony contradicts Mr. Jones' testimony to the Pharmacy Board following the inspection, where he admitted to removing such products from his shelves. CP at 343. Mr. Jones' attorney similarly verified to the Pharmacy Board in August of 1999 that "a few products slipped through the cracks...were missed and inadvertently not pulled..." CP at 350. He argued that these outdated drugs did not pose a health risk. CP at 350.

reasonable public official could have believed that invoking the summary suspension procedure was lawful. The court must not permit Mr. Jones to create a sham issue of fact by contradicting the statements he made to the Pharmacy Board, which it reasonably relied upon in adjudicating his case.

F. The Trial Court's Consideration of Hearsay Was Not Harmless

Mr. Jones incorrectly asserts that the trial court's consideration of self-serving hearsay in his declaration was harmless. In Paragraphs 11 and 13 of his declaration, Mr. Jones recounted out-of-court statements by Claudia Tomlinson and Sharla Keeling, which are not accounted for in Mr. Bauman's declaration or in any other admissible evidence in the record. CP at 175-76. Mr. Jones continues to rely on this hearsay, even in his brief on appeal. Jones' Brief at 8 – 9.

Mr. Jones argues that because the trial court indicated in its order that it considered this hearsay testimony not for the truth of the matter asserted, but as "background information," it committed no error. However, if this testimony were not considered for the truth of the matter asserted, it would be wholly irrelevant. The distinction made by Mr. Jones and the trial court between considering hearsay for the truth of the matter asserted and considering it for "background information" is unsupported by any evidence rule or other legal authority. The trial court was clearly

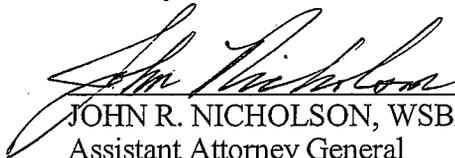
influenced by evidence which Mr. Jones has never disputed is hearsay. In any case, this court should refuse to consider this hearsay on appeal.

III. CONCLUSION

As regulators performing their duty to protect the public from the potential harms that can result from the violation of health and safety laws, the defendants below were immune. The extensive and prompt post-deprivation remedies available to Mr. Jones coupled with the serious health and safety violations he admitted establish that a reasonable public official could have believed summary action was justified. The trial court's holding denying immunity and allowing Mr. Jones to circumvent the administrative process designed to address his complaints in favor of filing this lawsuit was error. This court should reverse the trial court and dismiss Mr. Jones' claims.

RESPECTFULLY SUBMITTED this 6th day of November, 2006.

ROB MCKENNA
Attorney General



JOHN R. NICHOLSON, WSBA #30499
Assistant Attorney General
Attorneys for Petitioners/Defendants

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for filing with the Washington State Court of Appeals, Division I, via legal messenger, the original and one copy of the preceding Petitioners' Reply, at the following address:

Court of Appeals of Washington, Division I
State of Washington
600 University Street
Seattle, WA 98101

And that I arranged for a copy of the preceding Petitioners' Reply Brief to be served on counsel by legal messenger at the following addresses:

Murphy Evans
Brownlie & Evans, Wolf & Lee, LLP
100 Central Avenue
Bellingham, WA 98225

DATED this 6th day of November, 2006 at Seattle,
Washington.



RATTI VINCENT

Index to Appendices of Petitioners' Reply Brief

Appendix A: 11/20/03 Order Granting Plaintiff's Motion for Continuance Pursuant to CR 56 (f)

Appendix B: State's Motion for Protective Order

Appendix C: State's Response to Motion to Compel

Appendix D: Declaration of Steve Hodgson

Appendix E: Snohomish County Superior Court Commissioner's Orders Denying Defendants' Motion for Protective Order and Compelling Defendants to Provide Answers to Discovery Requests

Appendix F: State's Motion for Revision of Commissioner's Rulings

Appendix G: Order Granting State's Motion for Revision of Commissioner's Rulings

Appendix A

811
JRM

FILED

2003 NOV 21 AM 10:27

PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

RECEIVED
11:43 AM
SEP 07 2004

ATTORNEY GENERAL'S OFFICE
TORT CLAIMS DIVISION
SEATTLE

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

MICHAEL S. JONES, R. Ph.,

Plaintiff,

vs.

STATE OF WASHINGTON AND ITS
DEPARTMENT OF HEALTH;
WASHINGTON STATE BOARD OF
PHARMACY; PHYLLIS WENE and STAN
JEPPESEN, individually and as investigators
for the Washington State Board of Pharmacy,

Defendants

Case No.: 02-2-10037-4

ORDER GRANTING PLAINTIFF'S
MOTION FOR CONTINUANCE OF
DEFENDANTS' SUMMARY JUDGMENT
MOTION PURSUANT TO CR 56(f)

THIS MATTER, having come before the Court on Plaintiff's Motion for Continuance of Defendants' Summary Judgment Motion Pursuant to CR 56(f) at a regularly-scheduled hearing and the Court having heard the argument of counsel for the Plaintiff, Murphy Evans, Esq., and counsel for the Defendants, Gregory Jackson, Esq, and having reviewed the pleadings, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

A. Plaintiff's Motion for Continuance of Defendants' Summary Judgment Motion

Pursuant to CR 56(f) is GRANTED on the following conditions:

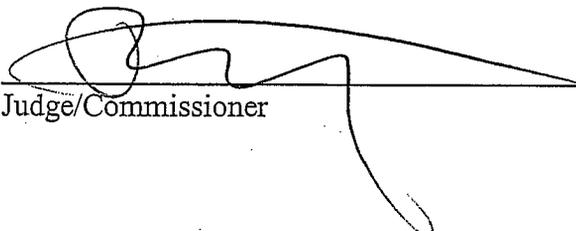
ORDER GRANTING CONTINUANCE OF
DEFENDANTS' SUMMARY JUDGMENT MOTION -

BROWNLIE & EVANS, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

ORIGINAL
29

1. The state may bring a summary judgment motion after May 1, 2004;
2. If the court grants the Plaintiff's motion, leave to file its first amended complaint, the state may bring a motion to dismiss or summary judgment motion on the issue of \$1983 liability only before May 1, 2004.
B. Defendants' motion for summary judgment that is presently scheduled for November 25, 2003, shall be continued until ~~the state may bring its summary judgment motion~~ after May 1, 2004.

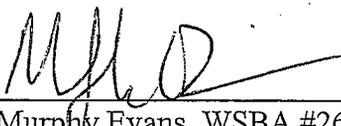
DONE IN OPEN COURT this 20 day of November, 2003.


Judge/Commissioner

Presented By:

BROWNLIE & EVANS, LLP

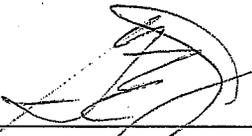
By:


Murphy Evans, WSBA #26293
Attorney for Michael Jones

Copy Received, Approved for Entry;

CHRISTINE GREGOIRE
Attorney General

By:


GREGORY JACKSON, WSBA #17541
JOHN R. NICHOLSON, WSBA #30499
Assistant Attorneys General
Attorneys for Defendants

Appendix B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

MICHAEL S. JONES, R.Ph.,
Plaintiff,

NO. 02-2-08819-6

DEFENDANTS' MOTION FOR
PROTECTIVE ORDER

v.

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,

Defendants.

I. Relief Requested

Defendants respectfully request that the court enter a protective order providing that they need not respond to Interrogatories 5 – 10 and Requests for Production 6 – 12 from Plaintiff's First Interrogatories and Requests for Production.¹

II. Statement of Facts

Plaintiff is a pharmacist who was involved in disciplinary proceedings before the Washington State Board of Pharmacy. See First Amended Complaint. On August 17, 1999,

¹ Plaintiff has filed two identical actions against the same defendants: one under the instant cause number and one under Snohomish County Cause No. 02-2-10037-4. Defendants request that the court's order on their motion for a protective order apply to both of these duplicative lawsuits.

1 his pharmacy license was summarily suspended by the Board of Pharmacy as an emergency
2 action pursuant to RCW 18.130.050 (7). First Amended Complaint, ¶ 3.9. Later, Plaintiff
3 stipulated to findings of fact, conclusions of law, and an agreed order that was entered by the
4 Board. First Amended Complaint, ¶3.13. Plaintiff has now brought a lawsuit against the
5 Board of Pharmacy, two pharmacy investigators, and the Executive Director of the Board of
6 Pharmacy. Plaintiff has alleged claims seeking money damages for denial of procedural due
7 process under 42 USC § 1983, negligent investigation, tortious interference with a business
8 relationship, as well as a claim for injunctive relief. See First Amended Complaint.

9 On October 22, 2003, Defendants received Plaintiffs' First Interrogatories and
10 Requests for Production. Nicholson Declaration, Ex. 1 (Plaintiff's Discovery Requests). This
11 set of discovery requests contained a series of interrogatories asking for the identification of
12 information relating to disciplinary actions taken against pharmacists other than the Plaintiff:

13
14 **INTERROGATORY NO. 5:** Identify all instances in which the Board of
15 Pharmacy has summarily suspended a pharmacist's license pursuant to an ex parte
16 order within the past ten years, and with respect to each instance answer the
17 following:

- 18 a. Date of summary suspension;
19 b. Identify the pharmacist;

20 **INTERROGATORY NO. 6:** Identify all instances in which the Board
21 Pharmacy summarily suspended a pharmacy license pursuant to an ex parte order,
22 and with respect to each instance answer the following:

- 23 a. Date of summary suspension;
24 b. Identify the pharmacy;
25 c. Describe in particularity and detail the allegations contained in the
26 statement of charges against the pharmacy;
27 d. Was a representative of the pharmacy given an opportunity to be
28 heard prior to the issuance of the ex parte order;
29 e. Did the pharmacy move for a stay of the suspension pending a
30 hearing on the merits; and if the answer is yes, was the motion for
31 a stay of suspension granted;
32 f. Describe in particularity and detail any administrative action taken
33 by the Board of Pharmacy on the statement of charges.

34 **INTERROGATORY NO. 7:** Identify all instances in which the Board of
35 Pharmacy took any administrative action to discipline a pharmacist within the
36 past ten years, and with respect to each instance answer the following:

- a. Date of action;

- b. Identify the pharmacist;
- c. Describe in particularity and detail the allegations which gave rise to the administrative action against the pharmacist;
- d. Describe in particularity and detail the administrative action taken.

INTERROGATORY NO. 8: Identify all instances in which the Board of Pharmacy took any administrative action to discipline a pharmacy within the past ten years, and with respect to each instance answer the following:

- a. Date of action;
- b. Identify the pharmacy;
- c. Describe in particularity and detail the allegations which gave rise to the administrative action against the pharmacy;
- d. Describe in particularity and detail the administrative action taken.

INTERROGATORY NO. 9: Have you ever been a party to any civil legal proceedings of any kind in which a pharmacist or pharmacy alleged that Phylis Wene or Stan Jeppesen conducted an improper investigation of the pharmacy? If so, for each such lawsuit or proceeding, please state the name and location of the court, agency, or other tribunal, state the title and cause number of each matter, and describe the nature of the lawsuit or proceedings and defendant's involvement therein.

INTERROGATORY NO. 10: Have you ever been a party to any civil legal proceedings of any kind in which a pharmacist or pharmacy alleged the disciplinary action taken by the Board of Pharmacy or Department of Health or either of its employees or agents violated the pharmacist's or pharmacy's civil rights? If so, for each lawsuit or proceeding, please state the name and location of the court, agency, or other tribunal, state the title and cause number of each matter, and describe the nature of the lawsuit or proceedings and defendant's involvement therein.

Nicholson Declaration, Ex. 1 (Plaintiff's Discovery Requests).

Plaintiff's requests for production also requested that many of the records identified in response to the above interrogatories be produced. *Id.*

On November 21, 2003, the Defendants served their responses on Plaintiff, objecting to the above interrogatories and requests for production, because they were unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Id., Ex. 2 (Responses to Plaintiff's Discovery Requests). The Department of Health maintains a computer database where some of the information in these records is indexed, but only for records for the last eight years. Hodgson Declaration, ¶ 5. The information retrievable from this database is limited. *Id.* Neither the archived paper copies of Pharmacy Board records nor

1 the computer database of the records are indexed according to (1) whether an *ex parte* order
2 was sought or obtained, (2) whether a pharmacist's license was summarily suspended, (3)
3 what administrative action against a pharmacist or pharmacy was taken, (4) names of
4 investigators involved in the proceedings, or (5) whether a pharmacist involved in the
5 proceedings alleged a civil rights violation. *Id.*, ¶¶ 5 – 6. Therefore, responding to the above
6 discovery requests would require a hand search of all of the disciplinary records, which would
7 take between 80 and 90 hours. *Id.*, ¶ 7. Necessary redaction of confidential whistleblower
8 and medical information contained in the files would take additional time. *Id.*, ¶ 8. On Friday,
9 September 3, 2004, counsel for Plaintiff and Defendants had a telephonic conference pursuant
10 to CR 26 (i) to discuss the above discovery requests. Nicholson Decl., ¶ 4.

11 III. Statement of Issues

12 Should the court relieve Defendants from responding to several of Plaintiff's
13 discovery requests where the requests are unduly burdensome and expensive and
14 call for information that is not reasonably calculated to lead to the discovery of
admissible evidence?

15 IV. Evidence Relied Upon

16 Defendants rely on the pleadings and the court's file in this matter, the Declaration of
17 John R. Nicholson and the exhibits thereto, the Declaration of Steve Hodgson and the exhibits
18 thereto (with the appended GR 17 Declaration of John R. Nicholson Re: Facsimile from Steve
19 Hodgson), and the authorities and arguments herein.

20 V. Authority

21 While the scope of discovery is broad, CR 26 (c) allows the court to limit discovery
22 upon motion for a protective order:

23 Upon motion by a party or by the person from whom discovery is sought, and for
24 good cause shown, the court in which the action is pending...may make any order
25 which justice requires to protect a party or person from annoyance,
26 embarrassment, oppression, or undue burden or expense, including one or more of
the following: (1) that the discovery not be had; (2) that the discovery may be had

1 only on specified terms and conditions, including a designation of the time or
2 place...

3 CR 26 (c).

4 In this case, the court should order that the Defendants need not respond to Plaintiff's
5 Interrogatories 5 – 10 and Requests for Production 9 – 12.

6 **A. Plaintiff's Interrogatories 5 – 10 and Requests for Production 9 – 12 Are Unduly
7 Burdensome and Expensive**

8 This court has authority to limit discovery where responding to a discovery request
9 would be unduly burdensome or expensive for the responding party. CR 26 (b) provides:

10 The frequency or extent of use of the discovery methods set forth in section (a)
11 shall be limited by the court if it determines that: ... (C) the discovery is unduly
12 burdensome or expensive, taking into account the needs of the case, the amount in
13 controversy, limitations on the parties' resources, and the importance of issues at
14 stake in the litigation.

15 CR 26 (b).

16 A motion for a protective order based on a discovery request's undue burden or
17 expense is appropriate where the moving party submits an affidavit with a specific
18 demonstration of fact in support of its motion. *Aikens v. Deluxe Financial Services*, 217 FRD
19 533, 536 (D. Kansas 2003). Here, Plaintiff's interrogatories 5 – 10 and Requests for
20 Production 6 – 12 are unduly burdensome and expensive. The records of the Department are
21 not indexed according to the criteria called for in Plaintiff's discovery requests. Thus,
22 answering these interrogatories and requests for production would require a hand search
23 through all of the Department's archived records. 80 to 90 hours of work will be required
24 merely to parse through the Department's archived files from the past ten years to identify
25 files that are responsive to these requests.

26 The files from the Board of Pharmacy requested by Plaintiff also will contain
confidential information. The identity of whistleblowers who file complaints against
pharmacists for unprofessional conduct must remain confidential. RCW 43.70.075. In

1 addition, these files typically contain medical information that is confidential and must also be
2 removed to protect the privacy interests of the patients. The process of redacting the great
3 amount of confidential information from the files requested by Plaintiff would require even
4 more time. Whatever interest Plaintiff has in obtaining this information is outweighed by the
5 tremendous burden and expense of the search required to provide a response.

6 **B. Any Interest Plaintiff Has in Obtaining the Information and Documents**
7 **Requested in Interrogatories 5 – 10 and Requests for Production 9 – 12 is**
8 **Outweighed by the Enormous Burden to the Defendants in Responding**

9 Plaintiff's discovery requests at issue also call for information that is not admissible
10 and that is not reasonably calculated to lead to the discovery of admissible evidence.
11 Information about disciplinary proceedings against pharmacists other than the Plaintiff are
12 irrelevant to this case. The fact that the Pharmacy Board may have summarily suspended
13 some unknown pharmacist's in a completely unrelated disciplinary proceeding makes it
14 neither more nor less likely (1) that Plaintiff's constitutional rights were violated; (2) that the
15 Defendants intentionally interfered with one of Plaintiff's business expectancies; (3) that the
16 Defendants were somehow negligent in investigating the Plaintiff; or (4) that Plaintiff is
17 entitled to the injunctive relief he requests. Given that these requests are not calculated to lead
18 to the discovery of any evidence that would be admissible in this case, the court should find
19 that the Defendants need not undergo the tremendous burden and expense of responding to
20 them.

20 //
21 //
22 //
23 //
24 //
25 //
26

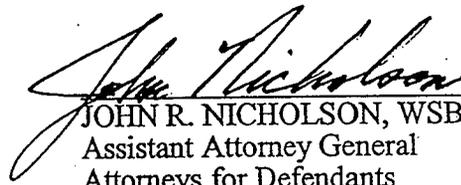
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

VI. Conclusion

Responding to Plaintiff's Interrogatories 5 – 10 and Requests for Production 9 – 12 would be unduly burdensome and expensive. Given that the requests do not request information that is relevant or that could somehow lead to the discovery of admissible evidence, the burden and expense of responding far outweighs any benefit to Plaintiff of obtaining this information. This court should therefore excuse the Defendants from answering these discovery requests.

DATED this 9th day of September, 2004.

CHRISTINE O. GREGOIRE
Attorney General


JOHN R. NICHOLSON, WSBA No. 30499
Assistant Attorney General
Attorneys for Defendants

Appendix C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

MICHAEL S. JONES, R.Ph.,
Plaintiff,

NO. 02-2-08819-6

DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL

v.

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,
Defendants.

I. Relief Requested

Defendants respectfully request that the court deny Plaintiff's motion to compel and deny his request for attorney's fees.

II. Statement of Facts

A. Plaintiff's Claims in this Case and Plaintiff's First Interrogatories and Requests for Production

Plaintiff is a pharmacist who was involved in disciplinary proceedings before the Washington State Board of Pharmacy. See First Amended Complaint. On August 17, 1999, his pharmacy license was summarily suspended by the Board of Pharmacy as an emergency

1 action pursuant to RCW 18.130.050 (7). First Amended Complaint, ¶ 3.9. Later, Plaintiff
2 stipulated to findings of fact, conclusions of law, and an agreed order that was entered by the
3 Board. First Amended Complaint, ¶3.13. Plaintiff has now brought a lawsuit against the
4 Board of Pharmacy, two pharmacy investigators, and the Executive Director of the Board of
5 Pharmacy. Plaintiff has alleged claims seeking money damages for denial of procedural due
6 process under 42 USC § 1983, negligent investigation, tortious interference with a business
7 relationship, as well as a claim for injunctive relief. See First Amended Complaint.

8 Plaintiffs' First Interrogatories and Requests for Production contain a series of interrogatories
9 asking for the identification of information and records relating to disciplinary actions taken
10 against pharmacists other than the Plaintiff. Declaration of Murphy Evans, ¶ 8.

11 **B. Disciplinary Records of the Board of Pharmacy**

12 On November 21, 2003, the Defendants served their responses on Plaintiff, objecting
13 to the above interrogatories and requests for production, because they were unduly
14 burdensome and not reasonably calculated to lead to the discovery of admissible evidence.
15 Nicholson Declaration, Ex. 1 (Responses to Plaintiff's Discovery Requests). The Department
16 of Health maintains a computer database where some of the information in these records is
17 indexed, but only for records for the last eight years. Hodgson Declaration, ¶ 5. The
18 information retrievable from this database is limited. *Id.* Neither the archived paper copies of
19 Pharmacy Board records nor the computer database of the records are indexed according to
20 the criteria called for by Plaintiff's discovery requests: (1) whether an *ex parte* order was
21 sought or obtained, (2) whether a pharmacist's license was summarily suspended, (3) what
22 administrative action against a pharmacist or pharmacy was taken, (4) names of investigators
23 involved in the proceedings, or (5) whether a pharmacist involved in the proceedings alleged a
24 civil rights violation. *Id.*, ¶¶ 5 – 6. Therefore, responding to the above discovery requests
25 would require a hand search of all of the Board's archived disciplinary records, which would
26

1 take between 80 and 90 hours. *Id.*, ¶ 7. Necessary redaction of confidential whistleblower
2 and medical information contained in the files would take additional time. *Id.*, ¶ 8.

3 **C. Counsel's CR 26 (i) Conference**

4 On Friday, September 3, 2004, counsel conducted a telephonic CR 26 (i) conference.
5 Nicholson Declaration in Opposition to Motion to Compel, ¶ 3. Counsel for the defendants
6 advised Plaintiff's counsel that he had contacted the records custodian who maintains the
7 records responsive to the discovery requests at issue, and that he related that there was no way
8 to search the records according to the criteria in his request. *Id.* Consequently, a hand search
9 of all the disciplinary records archived by the Board would be necessary to respond to these
10 requests. *Id.* He further advised that the records custodian had related that such a search
11 would take between 80 and 90 hours, and that the defendants believed that his discovery
12 requests were unduly burdensome. *Id.* Counsel for the State advised Plaintiff's counsel that
13 he would be bringing a motion for a protective order with respect to these discovery requests.
14 *Id.* Plaintiff's counsel also wished to discuss additional discovery requests, and counsel
15 agreed that they would speak again the following Wednesday, September 8, 2004. *Id.*, ¶ 4.
16 When counsel spoke again as agreed on September 8th, Plaintiff's counsel advised that he had
17 already noted this motion to compel. *Id.*, ¶ 4.

18 **III. Statement of Issues**

19 Should Plaintiff's motion to compel be denied where (1) Plaintiff's request are
20 unduly burdensome or expensive and (2) are not reasonably calculated to lead to
21 the discovery of admissible evidence?

22 Should Plaintiff's request for attorney's fees under CR 37 be denied where (1)
23 Defendants' opposition to Plaintiff's discovery requests is substantially justified
24 and (2) Plaintiff's motion to compel was unnecessary in light of the Defendants'
25 motion for a protective order regarding the same discovery requests?
26

1 **IV. Evidence Relied Upon**

2 Defendants rely on the pleadings and the court's file in this matter and the following
3 documents:

- 4 (1) Declaration of John R. Nicholson in opposition to Plaintiff's motion to
5 compel and the exhibits thereto (filed contemporaneously with this
6 response);
- 7 (2) Declaration of John R. Nicholson (filed on September 13, 2004,
8 contemporaneously with Defendants' motion for a protective order under
9 Snohomish County Cause No. 02-2-08819-6) and the exhibits thereto;
- 10 (3) Declaration of Steve Hodgson (filed on September 13, 2004,
11 contemporaneously with Defendants' motion for a protective order under
12 Snohomish County Cause No. 02-2-08819-6) and the exhibits thereto;
- 13 (4) Declaration of Murphy Evans (filed contemporaneously with Plaintiffs'
14 motion to compel) and the exhibits thereto.

15 **V. Authority**

16 Plaintiff's motion to compel should be denied, because the discovery requests at issue
17 are unduly burdensome and expensive. In addition, the requests are not reasonably calculated
18 to lead to the discovery of admissible evidence. Plaintiff's request for attorney's fees should
19 be denied, because this opposition is substantially justified and Plaintiff's motion to compel
20 was unnecessary in light of Defendants' motion for a protective order.

21 **A. Plaintiff's Discovery Requests Are Unduly Burdensome and Expensive**

22 This court has authority to limit discovery where responding to a discovery request
23 would be unduly burdensome or expensive for the responding party. CR 26 (b) provides:

24 The frequency or extent of use of the discovery methods set forth in section (a)
25 shall be limited by the court if it determines that: ... (C) the discovery is unduly
26 burdensome or expensive, taking into account the needs of the case, the amount in
controversy, limitations on the parties' resources, and the importance of issues at
stake in the litigation.

CR 26 (b).

1 Here, Plaintiff's interrogatories 5 – 10 and Requests for Production 6 – 12 are unduly
2 burdensome and expensive. The records of the Department are not indexed according to the
3 criteria called for in Plaintiff's discovery requests. Thus, answering these interrogatories and
4 requests for production would require a hand search through all of the Department's archived
5 records. 80 to 90 hours of work will be required merely to parse through the archived files
6 from the past ten years to identify files that are responsive to these requests.

7 The files from the Board of Pharmacy requested by Plaintiff also will contain
8 confidential information. The identity of whistleblowers who file complaints against
9 pharmacists for unprofessional conduct must remain confidential. RCW 43.70.075. In
10 addition, these files typically contain medical information that is confidential that must also be
11 removed to protect the privacy interests of the patients. The process of redacting the great
12 amount of confidential information from the files requested by Plaintiff would require even
13 more time. Whatever interest Plaintiff has in obtaining this information is outweighed by the
14 tremendous burden and expense of the search required to provide a response.

15 **B. Plaintiff's Discovery Requests Are Not Reasonably Calculated to Lead to the**
16 **Discovery of Admissible Evidence**

17 Requests for materials and information that are neither relevant nor reasonably
18 calculated to lead to the discovery of admissible evidence are beyond the scope of discovery
19 under CR 26 (b). Notwithstanding the enormous burden and expense of providing a response
20 to Plaintiff's requests, Plaintiff utterly fails to explain how the disciplinary records of other
21 pharmacists is either relevant or likely to lead to the discovery of admissible evidence in this
22 case. Plaintiff argues that "the requested information is necessary for Jones to establish that
23 no emergency existed that would have relieved the state of its obligation to provide him notice
24 of its motion to summarily suspend his license." Plaintiff's Motion to Compel at 5.

25 First, Plaintiff cannot allege claims against the Defendants that are premised on a
26 challenge to the Pharmacy Board's summary suspension of his license, because the Board and

1 its employees are entitled to immunity for actions related to disciplinary proceedings.
2 Furthermore, even if Plaintiff could state cognizable claims that were not barred by the
3 Defendants' absolute immunity, the information sought is wholly irrelevant and not
4 reasonably calculated to lead to other admissible evidence.

5 The Pharmacy Board is the only entity with the statutory authority to summarily
6 suspend or otherwise deprive Plaintiff of his pharmacy license. RCW 18.130.050 (7); WAC
7 246-869-190 (8); RCW 18.130.160; RCW 18.130.180. It is also the only entity with the
8 authority to investigate pharmacists for unprofessional conduct. RCW 18.130.050. The
9 Board is a quasi-judicial body that is absolutely immune from liability based on its actions
10 related to disciplinary proceedings. *Dutton v. Washington Physicians Health Program*, 87
11 Wn. App. 614, 619, 943 P.2d 298 (1997). This immunity extends to the State and the
12 Department of Health. *Id.* The Board and its employees are also conferred statutory
13 immunity under RCW 18.64.005 (9) and RCW 18.130.300 for actions they take in their
14 official capacities that are related to disciplinary proceedings. Thus, Plaintiff's claims against
15 the Defendants that are premised on the Board's determination that an emergency existed
16 requiring summary action are barred by several immunities and are not cognizable.

17 Furthermore, even if Plaintiff could somehow challenge the Pharmacy Board's
18 determination that an emergency existed that required the summary suspension of his license
19 and premise a tort cause of action on that decision, the information he requested is still not
20 probative of any issue. The fact that the Board ordered summary suspensions in disciplinary
21 proceedings involving pharmacists other than the plaintiff makes it no more or less likely that
22 (1) Plaintiff was somehow denied due process; (2) that the Defendants were negligent in
23 conducting their investigation of Plaintiff's pharmacy; (3) that the Defendants tortiously
24 interfered with a business expectancy of the Plaintiff; or (4) that Plaintiff is entitled to the
25 injunctive relief he has requested. None of the authorities cited by Plaintiff indicate that
26

1 documents or records from other unrelated proceedings are somehow relevant to a due process
2 claim.

3 The Pharmacy Board made the determination that an emergency existed requiring
4 summary suspension of Plaintiff's pharmacy license under RCW 18.130.050 (7) and WAC
5 246-869-190 (8) based on the evidence before it as indicated in its order of summary
6 suspension, not based on allegations and evidence in proceedings involving other pharmacists.
7 Plaintiff's requests for information and documents from Board disciplinary proceedings that
8 do not involve the Plaintiff are therefore wholly irrelevant and not reasonably calculated to
9 lead to the discovery of any evidence that will be admissible in this case.

10 **C. Plaintiff's Request for Attorney's Fees Should Be Denied**

11 Plaintiff has asked for \$500 in attorney's fees as a sanction for bringing this motion to
12 compel under CR 37. However, CR 37 provides that such fees should not be awarded where
13 "the court finds that the opposition to the motion was substantially justified or that other
14 circumstances make an award of expenses unjust." CR 37. Here, the defendants' opposition
15 to this motion is substantially justified, because the burden and expense of responding to
16 Plaintiff's discovery requests is too great, especially in light of the fact that they seek
17 information not reasonably calculated to lead to the discovery of admissible evidence.

18 More importantly, it was completely unnecessary for Plaintiff to bring this motion to
19 compel, as the Defendants have filed a motion for a protective order to be heard on the same
20 date. On September 3rd, when counsel conducted their discovery conference pursuant to CR
21 26 (i), counsel for the defendants indicated that he would be bringing a motion for a protective
22 order seeking relief from the discovery requests brought before the court in this motion.
23 Counsel agreed to speak by telephone the following Wednesday, September 8th, regarding
24 other discovery issues. On September 8th, when counsel spoke again as planned, counsel for
25 the State inquired as to Plaintiff's counsel's availability for the motion for protective order,
26 but Plaintiff's counsel indicated that he had already noted a motion to compel (despite already

1 being told that the Defendants would file a motion for protective order). Thus, any fees
2 Plaintiff's counsel expended in preparing this motion to compel were entirely self-inflicted
3 and unnecessary.

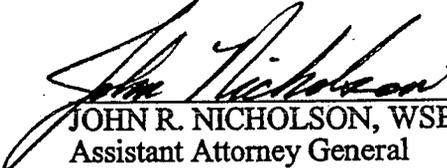
4 Finally, Plaintiff has brought two identical motions under two cause numbers. The
5 two motions to compel, like the two identical complaints filed by Plaintiff, are completely
6 duplicative. Plaintiff cannot ask to compel the same materials twice and seek fees in doing so,
7 just as he cannot ask this court to give him the same relief twice by filing two identical
8 complaints.

9 **VI. Conclusion**

10 For all the above reasons, the court should deny Plaintiff's motion to compel and deny
11 his request for attorney's fees.

12
13 DATED this 16th day of September, 2004.

14
15 CHRISTINE O. GREGOIRE
16 Attorney General

17 
18 JOHN R. NICHOLSON, WSBA No.30499
19 Assistant Attorney General
20 Attorneys for Defendants
21
22
23
24
25
26

Appendix D

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT**

MICHAEL S. JONES, R.Ph.,

Plaintiff,

v.

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,

Defendants.

NO. 02-2-08819-6

DECLARATION OF
STEVE HODGSON

I, Steve Hodgson, declare as follows:

1. I am over the age of 18 years, am competent to testify, and have personal knowledge of the matters stated herein.

2. I have been employed by the Washington State Department of Health (DOH) for approximately eight years. My current position with DOH is Health Services Consultant, and I have held this position for approximately three years. One of my duties as Health Services Consultant is maintenance of DOH records relating to Board of Pharmacy disciplinary proceedings.

DECLARATION OF
STEVE HODGSON

COPY

ATTORNEY GENERAL OF WASHINGTON
Testimony Division
900 Fourth Avenue Ste 2200
Seattle, WA 98146-1012
(206) 464-7352

1 3. Attached hereto as Exhibit 1 is a true and correct copy of an excerpt of
 2 interrogatories and requests for production that I have reviewed at the request of the Attorney
 3 General's Office. It is my understanding that these interrogatories and requests for production
 4 are related to a lawsuit brought against the Department of Health, Board of Pharmacy, and
 5 several State employees.

6 4. Providing a response to several of the interrogatories and requests for production in
 7 Exhibit 1 would require a search of a great volume of records that would be extremely difficult
 8 or impossible. Interrogatory 5 requests identification of "all instances in which the Board of
 9 Pharmacy has summarily suspended a pharmacist's license pursuant to an ex parte order within
 10 the past ten years" and requests the date of summary suspension and identity of the pharmacist
 11 for each such suspension. Interrogatory 6 requests identification of "all instances in which the
 12 Board of Pharmacy summarily suspended a pharmacy license pursuant to an ex parte order"
 13 without any limitation on time period. Interrogatories 7 and 8 request information about "all
 14 instances in which the Board of Pharmacy took any administrative action to discipline a
 15 pharmacist" and "pharmacy," respectively. Interrogatory 9 requests specific information about
 16 any "civil legal proceeding" where certain investigators were "alleged to have conducted an
 17 improper investigation." Interrogatory 10 requests specific information about legal
 18 proceedings where "a pharmacist or pharmacy alleged" that his or her civil rights were
 19 violated. Requests for Production 9, 10, 11, and 12 in Exhibit 1 ask that certain records
 20 identified in response to Interrogatories 5, 6, 7, and 8 be produced. These requests are
 21 extremely burdensome, because Board of Pharmacy disciplinary records are not indexed
 22 according to the criteria specified in the requests.

23 5. Some information pertaining to Board of Pharmacy disciplinary records for the last
 24 eight years is consistently accessible by computer database. However, the ways in which
 25 information is indexed in this database is quite limited. The database information is indexed
 26 by case name, date, violation, and case outcome (i.e., final disposition). The database is not

DECLARATION OF
 STEVE HODGSON

ATTORNEY GENERAL OF WASHINGTON
 Tort Claims Division
 900 Fourth Avenue Ste 2200
 Seattle, WA 98146-1012
 (206) 464-7152

1 indexed according to (1) whether an ex parte order was sought or obtained, (2) whether a
2 pharmacist's license was summarily suspended, (3) what administrative action against a
3 pharmacist or pharmacy was taken, (4) specific allegations made against investigators or (5)
4 whether a pharmacist involved in the proceedings alleged a civil rights violation. Furthermore,
5 most Board of Pharmacy disciplinary records that are more than eight years old are not indexed
6 in the computerized database at all.

7 6. Paper copies of non-current Board of Pharmacy disciplinary proceeding records are
8 archived. Again, these records are not indexed according to (1) whether an ex parte order was
9 sought or obtained, (2) whether a pharmacist's license was summarily suspended, (3) what
10 administrative action against a pharmacist or pharmacy was taken, (4) specific allegations
11 made against investigators, or (5) whether a pharmacist involved in the proceedings alleged a
12 civil rights violation.

13 7. Because Board of Pharmacy disciplinary records are not indexed according to the
14 criteria specified in Interrogatories 5, 6, 7, 8, 9, and 10, and Requests for Production 9, 10, 11,
15 and 12 in Exhibit 1, the only way to provide a response to these discovery requests is to
16 conduct a hand search through the Department's entire archive of records. I estimate that it
17 would take between 80 and 90 hours merely to identify and copy the files responsive to these
18 requests.

19 8. Board of Pharmacy disciplinary records typically contain a great deal of
20 confidential information. For instance, whistleblower information is confidential and
21 protected. Confidential medical information may also be present in these files. Therefore,
22 once the files responsive to the discovery requests in Exhibit 1 were identified and copied, any
23 confidential or otherwise protected information would have to be removed. A review of these
24 files and removal of confidential information in them would take a great deal of additional
25 time, as well.

26

DECLARATION OF
STEVE HODGSON

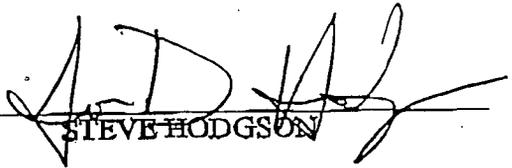
3

ATTORNEY GENERAL OF WASHINGTON
Tort Claims Division
900 Fourth Avenue Ste 2200
Seattle, WA 98146-1012
(206) 464-7152

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

DATED this 17th day of September, 2004 at Tumwater, Washington


STEVE HODGSON

DECLARATION OF
STEVE HODGSON

ATTORNEY GENERAL OF WASHINGTON
Tort Claims Division
900 Fourth Avenue Ste 2200
Seattle, WA 98146-1012
(206) 464-7352

Exhibit 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

RECEIVED
OCT 22 2003
ATTORNEY GENERAL'S OFFICE
TORT CLAIMS DIVISION
SEATTLE

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

Michael S. Jones, R.Ph.,

Case No. 02-2-08819-6

Plaintiff,

PLAINTIFF'S FIRST
INTERROGATORIES AND REQUESTS
FOR PRODUCTION TO DEFENDANTS

vs.

STATE OF WASHINGTON; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH; STATE OF WASHINGTON
DEPARTMENT OF HEALTH, BOARD OF
PHARMACY; PHYLLIS WENE and STAN
JEPPESEN,

Defendants.

- TO: State of Washington, Defendant
- AND TO: State of Washington, Department of Health, Defendant
- AND TO: State of Washington, Department of Health, Board of Pharmacy, Defendant
- AND TO: Phyllis Wene, Defendant
- AND TO: Stan Jeppesen, Defendant
- AND TO: Gregory Jackson, their attorney

Pursuant to Civil Rules 26, 33, and 34, plaintiff Michael S. Jones ("Jones") propounds the following interrogatories and requests for production of documents to defendants.

PL'S FIRST DISCOVERY REQUESTS - 1

BROWNLEE & EVANS, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

1 C. If you cannot answer the interrogatory in full, after exercising due diligence to
2 secure the information to do so, so state and answer to the extent possible, specify your inability
3 to answer the remainder, and state whatever information or knowledge you have concerning the
4 unanswered portion.

5 D. If a document called for by a request is known to have existed but cannot be
6 located now, identify the document and state:

7 1. Whether the missing document has been in your possession, custody, or
8 control;

9 2. When and where the missing document was known to be in your
10 possession, custody, or control; and

11 3. In whose possession, custody, or control such documents may be found or,
12 as applicable, whether the document has been destroyed or has otherwise ceased to exist.

13 E. After each document request, state whether all documents responsive to that
14 request will be produced.

15 F. For each document produced, indicate in some convenient manner, such as by
16 using slipsheets, the number of the document request or requests to which it is responsive.

17 G. In answering the interrogatories and requests for production, the following
18 instructions and definitions apply:

19 1. "Defendant" or "you" means defendants State of Washington, State of
20 Washington Department of Health, State of Washington Department of Health Board of
21 Pharmacy, Stan Jeppesen and Phyllis Wene, and all of their agents, representatives, employees,
22 attorneys, and accountants.

23 2. "Jones" or "plaintiff" means plaintiff Michael Jones.

24

PL'S FIRST DISCOVERY REQUESTS - 3

BROWNLEE & EVANS, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

3. "Complaint" refers to the Complaint filed by Jones against you in this action.

4. "Answer" means Defendants' Answer to Plaintiff's Complaint filed by you in this action.

5. "Document" shall be construed in its broadest sense, and includes any original, reproduction or copy of any kind of written or documentary material, or drafts thereof, including, but not limited to, correspondence, memoranda, inter-office communications, emails, notes, journals, desk calendars, diaries, contract documents, appointment books, publications, calculations, estimates, working papers, vouchers, minutes or meetings, invoices, reports, studies, computer tapes and diskettes, computer files (including information stored on hard drives or disk drives), CD-ROMs, photographs, negatives slides, video or audio tapes, telegrams, notes or telephone conversations, and notes of any oral communications.

6. Whenever any person must be "identified", the person shall be identified by name, last known address, telephone number, employers, and relationship to you.

7. Whenever any documents, as defined above, must be "identified," the persons involved or connected with such written communications must be identified; additionally, you should identify whether copies of such written communications remain in existence, and identify the location and person or persons having custody and control of such written communications.

8. For purposes of these requests and interrogatories, words in the masculine gender include the feminine and neuter, and singular word forms include the plural, the conjunctive includes the disjunctive, and vice-versa.

- 1 c. Describe in particularity and detail the allegations contained in the statement of
charges against the pharmacist;
- 2 d. Was the pharmacist given an opportunity to be heard prior to the issuance of the
ex parte order;
- 3 e. Did the pharmacist move for a stay of the suspension pending a hearing on the
merits; and if the answer is yes, was the motion for a stay of suspension granted;
- 4 f. Describe in particularity and detail any administrative action taken by the Board
of Pharmacy on the statement of charges.

5 ANSWER:

6

7 **INTERROGATORY NO. 6:** Identify all instances in which the Board of Pharmacy
summarily suspended a pharmacy license pursuant to an ex parte order, and with respect to each
instance answer the following:

- 8 a. Date of summary suspension;
- 9 b. Identify the pharmacy;
- 10 c. Describe in particularity and detail the allegations contained in the statement of
charges against the pharmacy;
- 11 d. Was a representative of the pharmacy given an opportunity to be heard prior to
the issuance of the ex parte order;
- 12 e. Did the pharmacy move for a stay of the suspension pending a hearing on the
merits; and if the answer is yes, was the motion for a stay of suspension granted;
- 13 f. Describe in particularity and detail any administrative action taken by the Board
of Pharmacy on the statement of charges.

14 ANSWER:

15 **INTERROGATORY NO. 7:** Identify all instances in which the Board of Pharmacy took
any administrative action to discipline a pharmacist within the past ten years, and with respect to
each instance answer the following:

- 16 a. Date of action;
- 17 b. Identify the pharmacist;
- 18 c. Describe in particularity and detail the allegations which gave rise to the
administrative action against the pharmacist;
- 19 d. Describe in particularity and detail the administrative action taken.

20 ANSWER:

21 **INTERROGATORY NO. 8:** Identify all instances in which the Board of Pharmacy took
any administrative action to discipline a pharmacy within the past ten years, and with respect to
each instance answer the following:

- 22 a. Date of action;
- 23 b. Identify the pharmacy;
- 24 c. Describe in particularity and detail the allegations which gave rise to the
administrative action against the pharmacy;
- d. Describe in particularity and detail the administrative action taken.

PL'S FIRST DISCOVERY REQUESTS - 6

BROWNIE & EVANS, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

ANSWER:

INTERROGATORY NO. 9: Have you ever been a party to any civil legal proceedings of any kind in which a pharmacist or pharmacy alleged that Phyllis Wene or Stan Jeppesen conducted an improper investigation of the pharmacy? If so, for each such lawsuit or proceeding, please state the name and location of the court, agency, or other tribunal, state the title and cause number of each matter, and describe the nature of the lawsuit or proceedings and defendant's involvement therein.

ANSWER:

INTERROGATORY NO. 10: Have you ever been a party to any civil legal proceedings of any kind in which a pharmacist or pharmacy alleged the disciplinary action taken by the Board of Pharmacy or Department of Health or either of its employees or agents violated the pharmacist's or pharmacy's civil rights? If so, for each such lawsuit or proceeding, please state the name and location of the court, agency, or other tribunal, state the title and cause number of each matter, and describe the nature of the lawsuit or proceedings and defendant's involvement therein.

ANSWER:

INTERROGATORY NO. 11: If you intend to introduce documentary or written pieces of evidence as exhibits at the trial of this action, please identify each and every such piece of documentary or written evidence. With respect to each such document, please state the following:

- (a) A general description thereof;
- (b) The date it was written or otherwise created;
- (c) The name and present or last known address of the person or persons who wrote it;
- (d) The name and present or last known address of the person to whom it was sent;
- (e) The name and address of the custodian thereof; and
- (f) Whether you have a copy thereof.

ANSWER:

INTERROGATORY NO. 12: Have you or anyone representing your interest obtained any statement, oral or written, signed or unsigned, of any shorthand or recorded statement, or any recorded conversation from any witnesses or from any one with knowledge of the facts or allegations in this case? If your answer is in the affirmative, please state the name of such witness, the date and place wherein each such statement was taken, in whose custody each such statement reposes, and whether each such statement is oral or written, signed or unsigned, in shorthand or recorded.

ANSWER:

PL'S FIRST DISCOVERY REQUESTS - 7

BROWNIE & EVANS, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

1

2

REQUESTS FOR PRODUCTION OF DOCUMENTS

3

REQUEST FOR PRODUCTION NO. 1: For each expert witness identified in response to Interrogatory No. 1, produce a copy of that person's curriculum vitae or resume; all documents used or reviewed by said expert as the basis of each expert's factual understanding, assumptions and opinions; all documents prepared by each expert with respect to this case; and all documents exchanged between you and each expert, including any reports prepared by said expert.

6

RESPONSE:

7

8

REQUEST FOR PRODUCTION NO. 2: Produce all documents which evidence, reflect, refer to, or constitute communications about any of your investigations of plaintiff and/or of plaintiff's pharmacy between January 1, 1990 and December 31, 1995.

9

RESPONSE:

10

11

REQUEST FOR PRODUCTION NO. 3: Produce all documents which evidence, reflect, refer to, or constitute communications about any of your investigations of plaintiff and/or of plaintiff's pharmacy in 1998.

12

RESPONSE:

13

14

REQUEST FOR PRODUCTION NO. 4: Produce all documents which evidence, reflect, refer to, or constitute communications about any of your investigations of plaintiff and/or of plaintiff's pharmacy in 1999.

15

RESPONSE:

16

17

REQUEST FOR PRODUCTION NO. 5: Produce all documents which evidence, reflect, refer to, or constitute communications about any administrative action taken by you or considered by you with respect to either plaintiff's license or plaintiff's pharmacy license between January 1, 1990 and December 31, 1995.

18

RESPONSE:

19

20

21

REQUEST FOR PRODUCTION NO. 6: Produce all documents which evidence, reflect, refer to, or constitute communications about any administrative action taken by you or considered by you with respect to either plaintiff's license or plaintiff's pharmacy license in 1998.

22

RESPONSE:

23

24

PL'S FIRST DISCOVERY REQUESTS - 8

BROWNLIE & EVANS, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

REQUEST FOR PRODUCTION NO. 7: Produce all documents which evidence, reflect, refer to, or constitute communications about any administrative action taken by you or considered by you with respect to either plaintiff's license or plaintiff's pharmacy license in 1999.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Produce each and every written statement you have obtained from any person which supports, negates, or relates to Jones's claims against you in this lawsuit.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Produce a copy of the investigation report(s) issued as part of each administrative action identified in interrogatory numbers 5 and 6 above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Produce a copy of the statement of charges issued as part of each administrative action identified in interrogatory numbers 5 and 6 above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Produce a copy of the investigation reports issued as part of each administrative action identified in interrogatory numbers 7 and 8 above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Produce a copy of the statement of charges issued as part of each administrative action identified in interrogatory numbers 7 and 8 above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 13: Produce copies of all charges or complaints and copies of any documents dispositive of each such charge or complaint for each matter identified by you in your answer to interrogatory no. 9.

RESPONSE:

REQUEST FOR PRODUCTION NO. 14: Produce copies of all charges or complaints and copies of any documents dispositive of each such charge or complaint for each matter identified by you in your answer to interrogatory no. 10.

RESPONSE:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

REQUEST FOR PRODUCTION NO. 15: Produce all documents which evidence, reflect, refer to, or constitute communications about the notice and opportunity to be heard described by you in your answer to interrogatory no. 4 above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 16: Produce all documents relating to any criminal charges that have ever been filed against you, including any documents relating to the disposition of the criminal charge.

RESPONSE:

REQUEST FOR PRODUCTION NO. 17: Other than documents produced in response to request for production numbers 1 through 16, produce all documents which evidence, reflect, refer to, or constitute communications by you to Jones or to Jones's attorney between August 10, 1999 and the present date.

RESPONSE:

REQUEST FOR PRODUCTION NO. 18: Other than the documents produced in response to request for production numbers 1 through 17, produce any and all documents which evidence, reflect, refer to, or constitute communications about Jones's claims against you in this lawsuit.

RESPONSE:

DATED this 11th day of October 2003.

BROWNLIE & EVANS, LLP


By: Murphy Evans, WSBA #26293
Attorney for Michael Jones

CERTIFICATION OF DELIVERY

I certify under penalty of perjury under the laws of the state of Washington that I mailed an original and one copy of this document to Gregory Jackson on the 21st day of October, 2003.

Signed: Brandi Benwick

PL'S FIRST DISCOVERY REQUESTS - 10

BROWNLIE & EVANS, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

MICHAEL S. JONES, R.Ph.,
Plaintiff,

NO. 02-2-08819-6

GR 17 DECLARATION OF
JOHN R. NICHOLSON
RE: FACSIMILE FROM STEVE
HODGSON

v.

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,

Defendants.

I, John R. Nicholson, declare as follows:

1. That I am an Assistant Attorney General in the Torts Division of the Office of the Attorney General, I am one of the attorneys representing the defendants in this case, I am over the age of eighteen (18), and I have personal knowledge of the matters herein.

2. I have examined the preceding facsimile copy of the Declaration of Steve Hodgson, and have determined that it consists of 4 pages, plus Exhibit 1 which consists of 11 pages, and my 2 page attached Declaration, and is complete and legible.

///

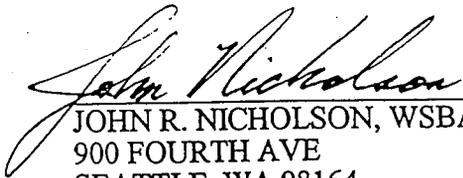
///

GR 17 DECLARATION OF
JOHN R. NICHOLSON
RE: FACSIMILE FROM STEVE
HODGSON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED this 8th day of September 2004 at Seattle, Washington.


JOHN R. NICHOLSON, WSBA No. 30499
900 FOURTH AVE
SEATTLE, WA 98164
(206) 464-7352
GS FAX (206) 587-4229

Appendix E

FILED

2004 SEP 21 PM 4:17

PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

MICHAEL S. JONES, R. Ph.,

Plaintiff,

vs.

STATE OF WASHINGTON AND ITS
DEPARTMENT OF HEALTH;
WASHINGTON STATE BOARD OF
PHARMACY; PHYLLIS WENE and STAN
JEPPESEN, individually and as investigators
for the Washington State Board of Pharmacy,
and DONALD WILLIAMS, individually and
as executive director of the Board of
Pharmacy,

Defendants

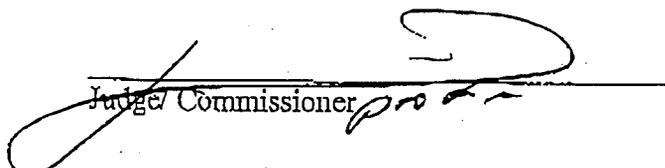
Case No.: 02-2-08819-6

**ORDER DENYING DEFENDANTS'
MOTION FOR A PROTECTIVE ORDER**

This Matter came before the Court on Defendants' motion for a protective order. The Court heard the oral argument of counsel for Plaintiff, Murphy Evans, Esq., and counsel for Defendants, John Nicholson, Esq., considered the pleadings filed in this action, and being otherwise fully advised, now therefore,

IT IS HEREBY ORDERED that Defendants' motion for a protective order is DENIED.

DATED this 21 day of September, 2004.

Judge/Commissioner 

ORDER DENYING DEFENDANTS' MOTION FOR
PROTECTIVE ORDER - 1

BROWNLIE EVANS & WOLF, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

ORIGINAL

1 Presented By:

2 **BROWNLIE EVANS & WOLF, LLP**

3
4 By: 
5 Murphy Evans, WSBA #26293
6 Attorney for Jones

7 Copy Received, Approved for Entry.

8 **CHRISTINE GREGOIRE**
9 Attorney General

10 By: 
11 JOHN R. NICHOLSON, WSBA #30499
12 Assistant Attorneys General
13 Attorneys for Defendants

14
15
16
17
18
19
20
21
22
23
24
25
ORDER DENYING DEFENDANTS' MOTION FOR
PROTECTIVE ORDER - 2

BROWNLIE EVANS & WOLF, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

FILED

2004 SEP 21 PM 4:17

PAUL J. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

MICHAEL S. JONES, R. Ph.,

Plaintiff,

vs.

STATE OF WASHINGTON AND ITS
DEPARTMENT OF HEALTH;
WASHINGTON STATE BOARD OF
PHARMACY; PHYLLIS WENE and STAN
JEPPESEN, individually and as investigators
for the Washington State Board of Pharmacy,
and DONALD WILLIAMS, individually and
as executive director of the Board of
Pharmacy,

Defendants

Case No.: 02-2-08819-6

**ORDER COMPELLING THE
DEFENDANTS TO PROVIDE ANSWERS
AND RESPONSES TO JONES'S FIRST
DISCOVERY REQUESTS**

This matter came before the Court on Plaintiff Michael Jones's motion for an order providing the following relief:

1. Requiring Defendants to answer interrogatories nos. 5, 6, 7, 8, 9, and 10 and to produce documents in response to requests for production nos. 9, 10, 11 and 12 of Plaintiff's First Interrogatories and Request for Production to Defendants, which were propounded October 21, 2003.
2. Awarding Jones reasonable fees and expenses incurred in bringing the motion.

ORDER COMPELLING DISCOVERY - 1

BROWNLIE EVANS & WOLF, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

ORIGINAL
[Signature]

1 The Court heard the oral argument of counsel for Jones, Murphy Evans, Esq., and
2 counsel for Defendants, John Nicholson, Esq. The Court also considered the pleadings filed in
3 this action.

4 Based on the argument of counsel and evidence presented, the Court finds as follows:

5 1. On October 21, 2003, Plaintiff propounded on the Defendants its first discovery
6 requests.

7 2. Defendants failed to provide full and complete answers to the following
8 interrogatories: Nos. 5, 6, 7, 8, 9, and 10.

9 3. Defendants failed to provide full and complete responses to the following requests
10 for production: Nos. 9, 10, 11 and 12.

11 4. Plaintiff has incurred reasonable attorney's fees in the amount of \$500.00 in
12 bringing this motion.

13 Based on the above findings, It Is Ordered:

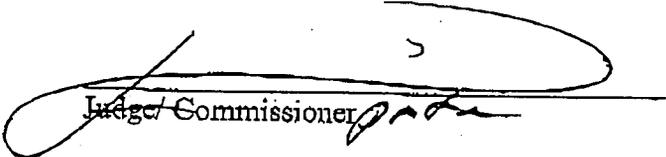
14 1. Plaintiff's motion to compel discovery is granted.

15 2. Defendants are ordered to provide full and complete answers, without objection,
16 to the following interrogatories: 5, 6, 7, 8, 9 and 10 on or before October 21, 2004 (Date).

17 3. Defendants are ordered to provide full and complete responses, without objection,
18 to the following requests for production: 9, 10, 11 and 12 on or before October 21, 2004
19 (Date)

20 4. Plaintiff's motion for attorney's fees is granted, and Defendants are order to pay
21 Plaintiff attorney's fees in the amount of \$ 500.00 on or before 0
22 (Date).

23 DATED this 21 day of September, 2004.

24
25 
Judge/Commissioner

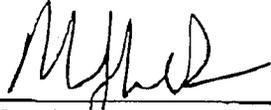
ORDER COMPELLING DISCOVERY - 2

BROWNLIE EVANS & WOLF, I.L.P.
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Presented By:

BROWNLIE EVANS & WOLF, LLP

By: 
Murphy Evans, WSBA #26293
Attorney for Jones

Copy Received, Approved for Entry,

CHRISTINE GREGOIRE
Attorney General

By: 
JOHN R. NICHOLSON, WSBA #30499
Assistant Attorneys General
Attorneys for Defendants

ORDER COMPELLING DISCOVERY - 3

BROWNLIE EVANS & WOLF, LLP
119 N. Commercial St., Suite 1250
Bellingham, WA 98225
(360) 676-0306

Appendix F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Hearing Date/Time: October 7, 2004 at 9:30 a.m.

**STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT**

MICHAEL S. JONES, R.Ph.,

Plaintiff,

v.

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,

Defendants.

NO. 02-2-08819-6

DEFENDANTS' MOTION FOR
REVISION OF COMMISSIONER'S
RULINGS

I. Relief Requested

Pursuant to Snohomish County Local Rule 7 (b) (2) (L), Defendants move the court to revise the September 21, 2004 ruling of the commissioner on Defendants' motion for a protective order and Plaintiff's motion to compel.

II. Statement of Grounds

On September 21, 2004, Defendants' motion for a protective order and Plaintiff's motion to compel was heard by a commissioner of this court. Both of these motions

1 concerned Plaintiff's Interrogatories Nos. 5 – 10 and Requests for Production Nos. 6 – 12
2 from Plaintiff's first set of discovery requests to the Defendants.

3 The commissioner denied the Defendants' motion for protective order and granted
4 Plaintiff's motion to compel. In addition, the commissioner awarded Plaintiff \$500.00 in
5 attorney's fees under CR 37 for bringing the motion to compel. A party may seek revision of
6 a commissioner's ruling under Local Rule 7 (b) (2) (L) if a timely motion for revision is filed.

7 III. Statement of Issues

8 The following orders entered by the commissioner on September 21, 2004 are
9 challenged by the Defendant for review in this motion:

- 10 (1) Order Denying Defendants' Motion for a Protective Order;
- 11 (2) Order Granting Plaintiff's Motion to Compel.

12 The commissioner erred in denying the Defendants' motion for protective order and
13 granting Plaintiff's motion to compel. The motion for protective order should have been
14 granted, and the motion to compel should have been denied. In addition, Plaintiff's request
15 for attorney's fees should have been denied.

16 IV. Evidence Relied Upon

17 Defendants rely on all the pleadings and materials submitted to the commissioner
18 relating to the Defendants' motion for protective order and Plaintiff's motion to compel,
19 which are attached to this motion as follows:

20 **Attachment A:** Defendants' Motion for Protective Order

21 **Attachment B:** Declaration of John R. Nicholson (filed on September 13,
22 2004, contemporaneously with Defendants' motion for a
23 protective order under Snohomish County Cause No. 02-2-
08819-6) and the exhibits thereto;

24 **Attachment C:** Declaration of Steve Hodgson (filed on September 13,
25 2004, contemporaneously with Defendants' motion for a
26 protective order under Snohomish County Cause No. 02-2-
08819-6) and the exhibits thereto;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Attachment D: Order Denying Defendants' Motion for Protective Order;

Attachment E: Plaintiff's Motion to Compel;

Attachment F: Declaration of Murphy Evans (filed contemporaneously with Plaintiffs' motion to compel) and the exhibits thereto;

Attachment G: Defendants' Response in Opposition to Plaintiff's Motion to Compel;

Attachment H: Declaration of John R. Nicholson in opposition to Plaintiff's motion to compel and the exhibits thereto;

Attachment I: Plaintiff's Reply in Support of Motion to Compel

Attachment J: Order Granting Plaintiff's Motion to Compel.

V. Legal Authority

A party may seek revision of a commissioner's ruling under Local Rule 7 (b)(2)(L) if a timely motion for revision is filed. A motion seeking review of an order of the commissioner is timely if it is filed within ten days of the entry of the commissioner's order. RCW 2.24.050. Review of the rulings on matters submitted in pleadings to the commissioner is *de novo*. LR 7 (b)(2)(L). Defendants rely on the arguments and authorities in their motion for a protective order and in their response to Plaintiff's motion to compel, which were submitted to the commissioner prior to the hearing of these motions. These pleadings and other materials are attached to this motion. Based on the foregoing, Defendants' motion for a protective order should have been granted, and Plaintiff's motion to compel and request for attorney's fees should have been denied.

//
//
//
//

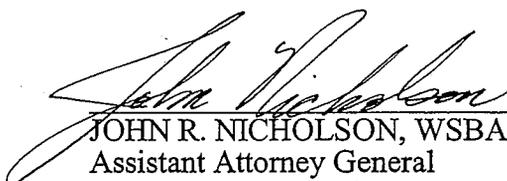
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

VI. Conclusion

Based on the foregoing and the authorities cited in the parties briefing submitted to the commissioner, Defendants' motion for a protective order should have been granted, and Plaintiff's motion to compel and request for attorney's fees should have been denied.

DATED this 27th day of September, 2004.

CHRISTINE O. GREGOIRE
Attorney General



JOHN R. NICHOLSON, WSBA No.30499
Assistant Attorney General
Attorneys for Defendants

Appendix G

D YL

FILED

OCT 07 2004

PAM L. DANIELS
SNOHOMISH COUNTY CLERK
OFFICE CLERK OF COURT

RECEIVED

OCT 07 2004

ATTORNEY GENERAL'S OFFICE
TORT CLAIMS DIVISION
SEATTLE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT**

MICHAEL S. JONES, R.Ph.,

Plaintiff,

v.

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,

Defendants.

NO. 02-2-08819-6

ORDER GRANTING DEFENDANTS'
MOTION FOR REVISION OF
COMMISSIONER'S RULINGS

[PROPOSED]

THIS MATTER came before the undersigned judge of the above-entitled court on Defendants' Motion for Revision of the Commissioner's September 21, 2004 rulings on Defendants' motion for a protective order and Plaintiff's motion to compel. The Court considered all the pleadings that were before the commissioner, as follows:

- (1) Defendants' Motion for Protective Order;
- (2) Declaration of John R. Nicholson (filed on September 13, 2004, contemporaneously with Defendants' motion for a protective order under Snohomish County Cause No. 02-2-08819-6) and the exhibits thereto;

1 (3) Declaration of Steve Hodgson (filed on September 13, 2004,
2 contemporaneously with Defendants' motion for a protective order under Snohomish County
3 Cause No. 02-2-08819-6) and the exhibits thereto;

4 (4) Order Denying Defendants' Motion for Protective Order;

5 (5) Plaintiff's Motion to Compel;

6 (6) Declaration of Murphy Evans (filed contemporaneously with Plaintiffs' motion
7 to compel) and the exhibits thereto;

8 (7) Defendants' Response in Opposition to Plaintiff's Motion to Compel;

9 (8) Declaration of John R. Nicholson in opposition to Plaintiff's motion to compel
10 and the exhibits thereto;

11 (9) Plaintiff's Reply in Support of Motion to Compel;

12 (10) Order Granting Plaintiff's Motion to Compel;

13 and the court being fully advised, now therefore, IT IS HEREBY ORDERED that
14 Defendants' Motion for Revision of the Commissioner's September 21, 2004 rulings on
15 Defendants' Motion for a Protective Order and Plaintiff's Motion to Compel is GRANTED.

16 The commissioner's September 21, 2004 rulings on these motions are revised as follows:

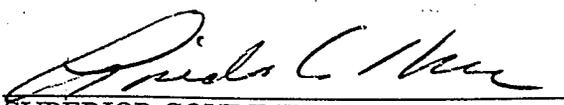
17 1. Defendants' motion for a Protective Order is GRANTED;

18 2. Plaintiff's motion to Compel is DENIED;

19 3. Plaintiff's request for attorney's fees is DENIED;

20 4. Defendants need not provide further responses to Interrogatories 5, 6, 7, 8, 9,
21 10 or Requests for Production 9, 10, 11, or 12 of Plaintiff's First Interrogatories and Requests
22 for Production.

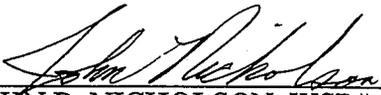
23 DONE IN OPEN COURT this 7th day of Oct, 2004.

24
25 
26 SUPERIOR COURT JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Presented by:

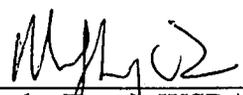
CHRISTINE O. GREGOIRE
Attorney General



JOHN R. NICHOLSON, WSBA No. 30499
Assistant Attorney General
Attorneys for Defendants

Approved as to Form and
Notice of Presentation Waived:

BROWNLIE, EVANS, & WOLF P.S.



Murphy Evans, WSBA No. 26293
Attorney for Plaintiff