

80787-6

X

NO. 80787-6

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL S. JONES R.Ph.,

Petitioner,

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,

Respondents.

**FILED**  
NOV 21 2007  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

ANSWER TO PETITION FOR REVIEW

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SUPREME COURT  
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BY RONALD R. CARPENTER  
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## **I. INTRODUCTION**

In August of 1999, the Washington State Pharmacy Board summarily suspended pharmacist Michael Jones' professional licenses, as the Legislature has authorized it to do in RCW 18.130.050 (7), after his pharmacy received failing scores at two consecutive inspections. The summary suspension order was not permanent, but was entered pending further disciplinary proceedings. In an unsuccessful effort to stay this action, Mr. Jones and his attorney submitted declarations to the Board admitting to many of the health and safety violations noted at the failing inspections, but representing that Mr. Jones had made changes and brought his pharmacy into compliance. Mr. Jones later agreed to the suspension of his licenses for five (5) years and waived the full administrative hearing where he could have contested the Board's actions. The Court of Appeals correctly held that Mr. Jones' subsequent tort lawsuit against the Board, its Executive Director, and the Board investigators who inspected his pharmacy was barred by the Respondents' absolute and qualified immunity, as well as by the exhaustion doctrine.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Does Mr. Jones' failure to challenge the court's holding that Executive Director Williams is entitled to absolute prosecutorial immunity render his arguments regarding qualified immunity moot?

2. Did the Court of Appeals correctly hold that Investigators Wene and Jeppesen are entitled to qualified immunity where (a) Mr. Jones failed to allege or demonstrate any evidence of a procedural due process violation by Wene or Jeppesen and (b) a reasonable public official could have believed that an emergency justifying summary action existed based on Mr. Jones' admissions of health and safety violations in declarations he submitted to the Pharmacy Board just weeks after the summary suspension occurred?
3. Did the Court of Appeals correctly hold that Mr. Jones' voluntarily stipulation to the suspension of his licenses and waiver of the Board's administrative hearing process barred his state law tort causes of action?

### III. COUNTER-STATEMENT OF THE CASE

On July 12, 1999, Pharmacy Board Investigators Phyllis Wene and Stan Jeppesen conducted an inspection of the Medicine Shoppe Pharmacy in Marysville, Washington, which was owned and operated by Michael Jones. CP at 268. After the inspection, Mr. Jones received a failing or unsatisfactory score of 48 out of 100.<sup>1</sup> CP at 268, 280. On August 10, 1999, Jeppesen returned to the Medicine Shoppe to conduct a required re-inspection of the pharmacy for purposes of determining whether Mr. Jones corrected the previously identified violations. CP at 270-73, 287. The re-inspection resulted in another unsatisfactory score of 56. CP at 273, 287.

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<sup>1</sup> The inspectors' reports pertaining to the July and August 1999 inspections of Mr. Jones' pharmacy are attached to this Answer as Appendix B. Board of Pharmacy regulations provide that all pharmacies shall be subject to periodic inspections to determine compliance with the laws regulating the practice of pharmacy. WAC 246-869-190. The inspections are graded based on a score between 0 and 100 and are classified into three categories: (a) "Class A" – for inspection scores of 90 to 100; (b) "Conditional" – for inspection scores of 80 to 89; and (c) "Unsatisfactory" – for inspection scores below 80. *Id.* If a pharmacy receives an "unsatisfactory" score, the pharmacy must raise its score to 90 or better within fourteen (14) days. WAC 246-869-190 (5).

The inspection reports completed by Jeppesen alleged numerous violations of laws and regulations pertaining to pharmacists. CP at 269-73, 279-89. Mr. Jones' prior history of sanctionable conduct included a failed inspection in December 1998 and having his license placed on probation in 1994 after a prescription filling error. CP at 212 – 214, 298.

On August 16, 1999, Donald Williams, Executive Director of the Pharmacy Board, made an ex parte motion for summary suspension of Mr. Jones' licenses and filed a Statement of Charges against him.<sup>2</sup> CP at 273, 290-318. The next day, the Pharmacy Board granted the motion.<sup>3</sup> CP at 273, 319-26. The Board's summary suspension order was not permanent, and it was entered pending further proceedings by the Board. CP at 325. Later the same day that the summary suspension order was entered, Wene served Mr. Jones with the order, along with the Statement of Charges and a Notice for Opportunity of Settlement and Hearing. CP at 334-36.

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<sup>2</sup> The Pharmacy Board follows the adjudicative procedures of the Administrative Procedures Act (APA) and has adopted the model procedural rules for adjudicative proceedings. RCW 18.130.100; WAC 246-856-001. Under the rules, the Board can take emergency action and summarily suspend a pharmacist's license pending further disciplinary proceedings if, after reviewing evidence, it determines that there is an immediate danger to the public health, safety, or welfare that can only be addressed by summary action. RCW 18.130.050 (7); WAC 246-869-190 (8); WAC 246-11-300. Summary action takes effect upon the entry of the order, but no one is required to comply with a summary action order until the person is either served with the order or has knowledge of it. WAC 246-11-310. The APA provides that all license suspensions, including summary suspensions, may be appealed to Superior Court. RCW 18.64.200; RCW 18.130; WAC 246-11-310 (4); *See also* RCW 34.05, *et. seq.*

<sup>3</sup> A copy of the summary suspension order is attached as Appendix C to this Answer.

On August 30, 1999, Mr. Jones filed a motion to modify and stay the summary suspension, thereby waiving his right to a “prompt hearing,” which would have been required to occur within 20 days of the summary suspension had he requested it.<sup>4</sup> CP at 337-38. Mr. Jones and his attorney filed declarations in support of the motion, in which they acknowledged many of the problems identified as violations in the investigators’ inspection reports, but represented to the Board that these problems had been corrected.<sup>5</sup> CP at 339-52. Specifically, the declarations submitted by Mr. Jones established the following violations:

- The disease state-drug interaction fields of Mr. Jones’ automated patient medical records system were not turned on, such that Mr. Jones would be unable to detect potentially fatal allergic reactions of his patients. CP at 274, 341.
- Mr. Jones had not familiarized himself with how to conduct an “audit trail” in his automated medical records system, which is a feature that tracks changes to patient prescriptions, until *after* the investigators’ second inspection of his pharmacy in August of 1999. CP at 344.
- Mr. Jones’ disorganized record-keeping system did not allow him to verify for the investigators that his use of non-child resistant containers was requested or authorized by his patients. CP at 342, 349.

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<sup>4</sup> A “prompt hearing” must occur within twenty days of summary action, if requested. WAC 246-11-330. The Notice Mr. Jones received informed him that he could contest the summary action by written motion, in which case he would waive his right to a “prompt” hearing, but not a “regularly scheduled” hearing. CP at 330.

<sup>5</sup> Copies of the declarations by Mr. Jones and his attorney are attached as Appendix D to this Answer. The specific admissions by Mr. Jones and his attorney that were made in these declarations are discussed in more detail in the State’s briefing in the Court of Appeals. Excerpts of the State’s brief from Division I outlining these admissions are attached as Appendix E to this Answer.

- Outdated prescription items had not been removed from Mr. Jones' shelves, because they had "slipped through the cracks." CP at 343, 350.
- At the inspections, Mr. Jones could not locate numerous inventory records of controlled substances in his pharmacy, which must be maintained by pharmacists for at least two (2) years under both state and federal law. CP at 343 – 44. Mr. Jones further admitted in a more recent declaration that some prescription records were never located. CP at 214 – 215. Mr. Jones placed the blame for these missing records on one of his former employees, whom he claimed stole them. CP at 214 – 15.
- Mr. Jones' inventory records of Schedule II controlled substances and DEA forms, which pharmacists are required to keep separately from all other records for at least two (2) years, were incomplete and/or missing altogether. CP at 344.

A full three-member panel of the Board decided Mr. Jones' motion on September 7, 1999, just twenty-one (21) days after entry of the summary suspension order.<sup>6</sup> CP at 354-58. Mr. Jones had the opportunity to give oral argument on the motion to stay the summary suspension, but he elected not to do so. CP at 355. After considering the declarations and other supporting materials filed by Mr. Jones, the Board denied his motion to lift the summary suspension, reasoning that "it could not be assured by [Mr. Jones'] assertions that he has corrected the problems and that he will remain in compliance." CP at 357. It was concerned that "[Mr. Jones had] a history of committing violations of the pharmacy law, correcting

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<sup>6</sup> A copy of the Board's order denying Mr. Jones' motion to stay the summary suspension is attached as Appendix F.

the violations, but then violating the laws again,” and concluded that “the concerns for the protection of the public outweigh [Mr. Jones’] assertions that the violations have been corrected.” CP at 357.

On January 11, 2000, Mr. Jones and his attorney signed stipulated findings of fact, conclusions of law, and an agreed order, resolving the Board’s administrative actions relating to the July and August 1999 inspections.<sup>7</sup> CP at 412 – 31. Mr. Jones stipulated that he understood that the State was prepared to proceed to a hearing, that he had a right to defend himself, and that he was waiving his opportunity to the hearing. CP at 414. He “acknowledge[d] that the evidence [was] sufficient to justify” the facts set forth in the order. CP at 415-23. He further agreed that the facts alleged constituted unprofessional conduct that were grounds for the imposition of sanctions. CP at 423. By signing the order, Mr. Jones agreed to suspension of his pharmacist’s license and revocation of the pharmacy location license for the Medicine Shoppe for a period of five years, and other conditions and restrictions. CP at 424-30.

Mr. Jones later filed a lawsuit claiming that his right to procedural due process was violated, because he was not afforded a pre-deprivation hearing when his licenses were summarily suspended. He asserted a claim under 42 U.S.C. § 1983 seeking monetary damages against Pharmacy

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<sup>7</sup> A copy of the stipulated findings of fact, conclusions of law and agreed order is attached as Appendix G.

Board Executive Director Williams and Board Investigators Phyllis Wene and Stan Jeppesen in their individual capacities. CP 474. He also asserted state law causes of action against these individual defendants, the Board, and the Department of Health. CP at 475 -76.<sup>8</sup>

The trial court denied the State's motions for summary judgment and reconsideration based on absolute immunity, qualified immunity, and failure to exhaust administrative remedies. After granting discretionary review, on June 4, 2007 Division I reversed the trial court and remanded for an order dismissing Mr. Jones' lawsuit, reasoning (1) that Executive Director Williams was entitled to absolute prosecutorial immunity; (2) that all individual defendants were entitled to qualified immunity on Mr. Jones' § 1983 procedural due process claim; and (3) that Mr. Jones' state law tort causes of action were barred by his failure to exhaust administrative remedies. On September 17, 2007, the Court of Appeals granted the State's motion to publish its opinion.<sup>9</sup>

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<sup>8</sup> It appears that the only remaining state law cause of action Mr. Jones intends to assert is tortious interference with a business expectancy. Originally Mr. Jones also asserted causes of action in his Amended Complaint for negligence, recklessness, and injunctive relief. CP at 474 - 476. However, Mr. Jones voluntarily dismissed his claim for injunctive relief and conceded that his claims for negligence and recklessness should be dismissed. CP at 24, 129, 141 - 42.

<sup>9</sup> The State requested that the court publish the portion of its opinion holding that Executive Director Williams was entitled to absolute prosecutorial immunity, which Mr. Jones has not challenged in his Petition. The State also requested that the Court of Appeals publish the portion of its opinion on qualified immunity, because there is little case law interpreting the constitutionality of RCW 34.05.479 and RCW 18.30.050 (7),

## IV. ARGUMENT

### A. Summary of Argument

The Court of Appeals' holding that the individual defendants are entitled to qualified immunity on Mr. Jones' § 1983 claim does not involve any significant question of Constitutional law such that discretionary review would be proper under RAP 13.4(b)(3). In seeking review, Mr. Jones far overstates the scope of the court's opinion, which is predicated on specific admissions by Mr. Jones and a lack of any evidence that a procedural due process violation occurred. When applied in the context of Mr. Jones' admitted violations of health and safety laws in declarations executed just weeks following the Board's summary suspension of his licenses, the well settled law provides that the Board's extensive and timely post-deprivation process satisfied the requirements of procedural due process. Furthermore, because Mr. Jones has not challenged the court's finding that Williams is entitled to absolute prosecutorial immunity, his request for review of the court's finding of qualified immunity is moot. This court should not review a moot issue.

The Court of Appeals also correctly held that Mr. Jones' state law claims are barred by his failure to exhaust administrative remedies, because he waived the hearing offered by the Board and stipulated to an

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the statutes under which the Board operated. Mr. Jones does not argue these statutes are unconstitutional or unlawful.

agreed order suspending his licenses for five (5) years. Contrary to Mr. Jones' argument, the court's decision is consistent with existing decisions of both this Court and the Court of Appeals, and the criteria for review under RAP 13.4 (b)(2) or RAP 13.4 (b)(4) have not been satisfied.

**B. Because Mr. Jones Has Not Challenged Executive Director Williams' Absolute Immunity, His Argument that Williams is Not Entitled to Qualified Immunity is Moot**

Executive Director Williams made the decision to file the motion for summary suspension of Mr. Jones' licenses. The Court of Appeals determined that Williams was entitled to absolute prosecutorial immunity, which barred Mr. Jones' claims against him as a matter of law. Mr. Jones has not challenged this holding in his petition, yet he now asks the court to reinstate his claims against Williams, apparently based on an argument that Williams was not entitled to qualified immunity. Given his failure to challenge Williams' absolute prosecutorial immunity, Mr. Jones' argument that Williams was not qualifiedly immune is moot, and there is no basis for Mr. Jones' request to reinstate any claims against Williams.

**C. Because There Was No Evidence of Any Procedural Due Process Violation, Mr. Jones Fails to Meet the Criteria of RAP 13.4 (b)(3) for Review of Court's Holding of Qualified Immunity**

Mr. Jones claims that the Court of Appeals' decision "suggests that there can be no procedural due process violation when the state affords

post-deprivation process.” Petition for Review at 8. However, the court’s opinion does not make such a broad holding. Rather, the opinion reflects that where Mr. Jones admitted to a great number of health and safety violations in declarations considered by the Pharmacy Board, a post-deprivation hearing satisfied due process and there was no genuine issue of material fact. Discretionary review of this decision is not appropriate.

Qualified immunity shields governmental officials performing discretionary functions from civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). When a court rules on qualified immunity, it must undertake the following analysis set forth by the U.S. Supreme Court:

A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry...

If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition...

...“...The contours of the right must be sufficiently clear that a reasonable official would be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” The relevant, dispositive inquiry in determining whether a right is clearly established is whether it

would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

*Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (citations omitted). If there could be reasonable disagreement about whether a defendant's action was lawful, qualified immunity still applies. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Once a defendant has raised qualified immunity, the plaintiff bears the burden of identifying the right violated and showing that it was clearly established. *Robinson v. City of Seattle*, 119 Wn.2d 34, 65 – 66, 830 P.2d 318 (1992). Summary judgment is appropriate if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant committed a constitutional violation. *Id.*

**1. Wene and Jeppesen's Investigative Conduct Did Not Give Rise to a Violation of Procedural Due Process**

Mr. Jones' Amended Complaint makes clear that his § 1983 claim is premised strictly on an alleged violation of procedural due process, not a violation of substantive due process or any other constitutional right. CP 254.<sup>10</sup> Given that Mr. Jones has not challenged Williams' absolute

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<sup>10</sup> Procedural due process ensures that the state will not deprive a person of life, liberty, or property unless fair procedures are used in making that decision, while substantive due process guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures are that are used in making the decision. *Armendariz v. Penman*, 31 F.3d 860, 865 – 67 (9<sup>th</sup> Cir. 1994), *reversed on other grounds*, 75 F.3d 1311 (9<sup>th</sup> Cir. 1996); *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10<sup>th</sup> Cir. 1998).

Mr. Jones has alleged that the defendants utilized an arbitrary and capricious scoring system and were unprofessional during the inspections. However, given that the

immunity, he must now intend to pursue his § 1983 procedural due process claim against Investigators Wene and Jeppesen only. However, Mr. Jones failed to show that the investigators, by inspecting his pharmacy and completing inspection reports for Williams' consideration, engaged in any conduct that even implicated his right to procedural due process.

Wene and Jeppesen did not deprive Mr. Jones of his licenses and had no authority to initiate disciplinary proceedings against him. Indeed, Mr. Jones' petition for review makes clear that the focus of his § 1983 claim is on the conduct of Williams (who is entitled to absolute immunity), not Wene or Jeppesen. In his petition, Mr. Jones reiterates that his § 1983 procedural due process claim is premised on the fact that "Executive Director Williams had the authority and opportunity to give Jones notice and an opportunity to be heard ... [and] to seek to suspend Jones's licenses pursuant to a regular adjudicatory hearing ... but failed to do so." Petition for Discretionary Review at 11 – 12. Wene and Jeppesen, on the other hand, had no such authority and did not make the decision to pursue the suspension of Mr. Jones' licenses.

Participating in an investigation does not implicate the right to procedural due process. In *Hannum v. Friedt*, 88 Wn. App. 881, 947 P.2d

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scope of Mr. Jones' § 1983 claim is limited to an alleged violation of procedural due process, these allegations are simply irrelevant. Thus, the Court of Appeals correctly refused to address Mr. Jones' unsupported allegations that the defendants violated his right to substantive due process. See Appendix A (Court of Appeals' Opinion, fn. 27).

760 (1997), Division I affirmed summary judgment of a § 1983 procedural due process claim that was asserted against investigators from the Department of Licensing for this very reason:

The proper inquiry is whether Gerrish, by investigating Hannum's transactions, deprived Hannum of property without due process of law. Hannum fails to specify how Gerrish's investigative actions deprived him of property without due process of law. The complaints allege that "the actions of Defendants to summarily suspend Mr. Hannum's license violates his due process rights under the United States and State of Washington Constitutions." Hannum's due process claim focuses on the defendants' actions of summarily suspending his vehicle dealer license. Personal participation in the alleged violation is an essential allegation in a Sec. 1983 claim. Gerrish did not personally participate in the filing of charges against Hannum or in the summary suspension of Hannum's vehicle dealer license.

*Id.* at 890-91 (citations omitted). Investigators Wene and Jeppesen's investigative conduct similarly implicates no procedural due process violation. Thus, the Court of Appeals correctly held that they are entitled to qualified immunity.

**2. Mr. Jones' Admissions to Health and Safety Violations Shortly Following the August 1999 Inspection Confirmed That Summary Action Was Reasonable**

Even if Mr. Jones provided evidence of any actionable conduct by the defendants, they are nevertheless entitled to qualified immunity based strictly on Mr. Jones' admissions to health and safety violations in declarations he submitted to the Board shortly following the second failing

inspection of his pharmacy in August 1999. The Court of Appeals' decision was grounded in these admissions by Mr. Jones:

In July 1999 and again in August 1999, Jones received an unsatisfactory score, even though he had been given an opportunity to correct his violations. Upon reinspection, the investigators found that several of the violations were still not addressed, including DEA records for schedule II drugs and records of customer requests for non child resistant (non-CRCs). The investigators also found prescriptions with incorrect NDA numbers in the customer pick-up bins, which Jones admitted had been there since the time of the last inspection. While he claimed in this lawsuit that the inspection reports were error, his August 1999 declarations admitted these facts were true.

App. A. (Court of Appeals Opinion at 13 – 14). In the cases cited by Mr. Jones, there were no such admitted serious health and safety violations.<sup>11</sup> In addition, the plaintiffs in these cases were not afforded post deprivation hearings, as the Board afforded Mr. Jones.<sup>12</sup> Consequently, these cases do not show that any clearly established right was violated here.

Mr. Jones' contention that the Court of Appeals committed error by analyzing the requirements of procedural due process under the criteria set forth in *Mathews v. Eldridge*, 424 US 319, 96 S. Ct. 893, 47 L. Ed. 2d

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<sup>11</sup> For example, in *Armendariz*, the Ninth Circuit permitted a §1983 procedural due process claim against two San Bernardino city officials who 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. The plaintiffs in *Armendariz* did not admit to violating health or public safety laws, as Mr. Jones did here.

<sup>12</sup> Thus, *Weinberg v. Whatcom County*, 241 F.3d 746 (9<sup>th</sup> Cir. 2001), is easily distinguishable from this case, because when the county in that case vacated the plaintiff developer's short plats, it offered no alternative procedural safeguards and could demonstrate no nexus between its summary action and any possible emergency. *Id.* at 754.

18 (1976) rather than with reference to *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), is without merit. *Mathews*, the Supreme Court's seminal opinion on the requirements of procedural due process, holds that the level of process owed to a private individual deprived of a property interest depends on a balancing of three factors: (1) the gravity of the private interest affected; (2) the risk of erroneous deprivation under the current procedure, and the probable value, if any, of additional procedural safeguards; and (3) the interest of the government, including the burdens of additional or substitute procedures. *Mathews*, 424 U.S. at 335. Where a plaintiff alleges a violation of procedural due process, the *Mathews* factors establish the proper framework for the court's analysis.<sup>13</sup>

*Hodel*, in which the Supreme Court recognized that summary administrative action is justified in emergency situations, simply reflects that where there is a potential threat to public health and safety, the State's interest is weightier: "Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action." *Hodel*, 452 U.S. at 300. Again, here Mr. Jones' subsequent

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<sup>13</sup> Notably, the Ninth Circuit has held that where a Constitutional right depends on an ad hoc balancing test, such as the *Mathews* factors, the violation of the right is rarely clearly established absent closely corresponding legal and factual precedent, and qualified immunity consequently will usually apply. *Brewster v. Board of Education of Lynwood Unified School Dist.*, 149 F.3d 971, 983 (9<sup>th</sup> Cir. 1998).

admissions confirmed that the State's interest in public safety was sufficiently imperative that summary action was appropriate.

**D. Mr. Jones Fails to Meet the Criteria of RAP 13.4 (b)(2) or (4) for Review of the Court's Holding That the Exhaustion Doctrine Bars His State Law Claims**

The Court of Appeals correctly held that any remaining state law claims asserted by Mr. Jones are barred by his failure to exhaust administrative remedies. Once summary action is taken against a pharmacist's license, the pharmacist may request a prompt adjudicative proceeding, which must occur within twenty (20) days of the summary action. WAC 246-11-330; WAC 246-11-340. If a license holder does not demand a "prompt" hearing, he is nevertheless entitled to contest a license suspension at a regularly scheduled hearing. WAC 246-11-330. First, Mr. Jones waived his opportunity to demand a prompt hearing. Then, because he voluntarily entered into an agreed order providing for a five-year suspension of his professional licenses, Mr. Jones waived the available regularly scheduled hearing as well.

The Court of Appeals correctly held that Washington law prohibits a tort lawsuit in these circumstances. A plaintiff must exhaust administrative remedies prior to filing a lawsuit when: (1) a claim is cognizable in the first instance by the agency; (2) the agency's authority sets out clearly defined processes for resolving the aggrieved party's complaint; and (3) the relief

sought can be obtained through an exclusive or adequate remedy. *Phillips v. King County*, 87 Wn. App. 468, 479, 943 P.2d 306 (1997). The policy underlying the doctrine is described as follows:

The doctrine is founded on the principle that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges, so that the administrative process will not be interrupted prematurely, so that the agency can develop the necessary factual background on which to reach its decision, so that the agency will have the opportunity to exercise its expertise and to correct its own errors, and so as not to encourage individuals to ignore administrative procedures by resorting to the courts prematurely.

*Id.* at 479 – 80. Mr. Jones' attempt to sue for damages after waiving a hearing to contest the suspensions and stipulating that the suspensions were a proper resolution of the Board's action contravenes this policy.

This case is analogous to *Laymon v. Wash. Dep't. of Natural Resources*, 99 Wn. App. 518, 994 P.2d 232 (2000), not contrary to it as Mr. Jones argues. There, the Department of Natural Resources (DNR) had issued a stop worker order requiring the plaintiff, Laymon, to cease logging on his property, because a bald eagle's nest had been reported. *Id.* at 522. Just as the order of summary suspension in this case had the effect of requiring Mr. Jones to cease the practice of pharmacy without a hearing first, the stop work order in *Laymon* was effective immediately and without any prior hearing. *Id.* The stop work order could have been

challenged by Laymon if he had filed a timely appeal with the Forest Practices Appeals Board. *Id.* 522-23. The Court of Appeals upheld dismissal of Laymon's state law tort lawsuit based on his failure to exhaust administrative remedies. *Id.* at 524-35 (quoting *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997)).

Mr. Jones focuses on his personal financial situation, in particular his loss of a franchise, to argue that his case is distinguishable from *Laymon*. However, the letter terminating Mr. Jones' franchise refers to "numerous material breaches" by Mr. Jones, and it demanded immediate payment for financial obligations on which Mr. Jones had apparently defaulted. CP at 219. The letter did not mention the summary suspension order. Even if the franchise was terminated due to the summary suspension, Mr. Jones' argument that a reversal of the suspensions could not have saved his franchise is speculative at best. Moreover, Mr. Jones' loss of a franchise did not preclude him from practicing as a pharmacist altogether.

In any case, the Board's administrative process was not futile, and Mr. Jones' financial hardships do not excuse him from exhausting available administrative remedies. Indeed, the summary stop work order issued by DNR caused an even greater economic hardship on the plaintiff land developer in *Laymon*, since the plaintiff's financial backers withdrew

from the project after they learned of it. *Id.* at 523. The Court of Appeals' opinion thus does not conflict with *Laymon*, and the criteria for review under RAP 13.4 (b)(2) have not been met.

Mr. Jones also argues that the court's reading of *Laymon* is so broad that it presents an issue of substantial public interest, such that review under RAP 13.4 (b)(4) is warranted. However, the facts of this case present much stronger grounds for holding that Mr. Jones' claims are barred under the exhaustion doctrine than the facts of *Laymon*. Mr. Jones not only failed to avail himself of the Board's hearing to contest its suspension of his licenses, he actually *agreed* to the suspensions. Holding that Mr. Jones could proceed with a lawsuit in this situation would not only contravene Washington law, it would reward duplicity. Mr. Jones derived a benefit when he agreed to a five-year suspension of his licenses, and the Pharmacy Board accepted and relied on his agreement when it signed the order. Mr. Jones should not now be permitted to take an inconsistent position in this action. The court's holding on the exhaustion doctrine presents no new legal issue of substantial public interest, and review under RAP 13.4 (b)(4) is likewise inappropriate.

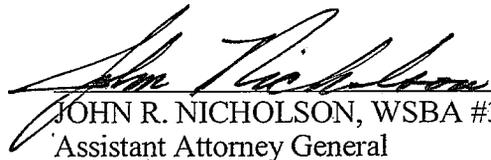
## V. CONCLUSION

The Court of Appeals' holding that the defendants were entitled to qualified immunity was premised on Mr. Jones' admission to health and

safety violations in declarations he submitted just weeks following the summary suspension of his licenses. These admissions confirmed that summary action was reasonable. Review under RAP 13.4 (b)(3) is improper, especially given that Mr. Jones' arguments regarding qualified immunity are moot in light of his failure to challenge the court's holding that Williams was entitled to absolute immunity. Finally, because the Court of Appeals' holding that the exhaustion doctrine bars Mr. Jones' state law claims was correct and consistent with existing case law, review of these claims under RAP 13.4 (b)(2) and (4) should also be denied.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of November, 2007.

ROBERT M. MCKENNA  
Attorney General

  
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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 the original and one copy of the preceding Answer to Petition for Review to be filed by Federal Express Delivery Service in the Supreme Court of Washington at the following address:

Supreme Court of Washington  
415 12<sup>th</sup> Avenue SW  
Olympia, WA 98504

And that I arranged for a copy of the preceding Answer to Petition for Review to be served on appellant's counsel at the following address by legal messenger:

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

DATED this 20<sup>th</sup> day of November, 2007 at Seattle,

Washington.

  
\_\_\_\_\_  
PATTI VINCENT

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## Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL S. JONES, R.Ph.,	)	
	)	No. 57850-2-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
STATE OF WASHINGTON; STATE OF	)	
WASHINGTON, DEPARTMENT OF	)	
HEALTH; STATE OF WASHINGTON,	)	
DEPARTMENT OF HEALTH, 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	)	UNPUBLISHED OPINION
executive director of the Board of	)	
Pharmacy,	)	FILED: June 4, 2007
	)	
Appellants.	)	
_____	)	

AGID, J. -- Michael Jones purchased a pharmacy franchise in Marysville, obtained a pharmacy license for it, and became its sole licensed pharmacist. From 1996 through 2000, the Washington State Board of Pharmacy (Board) inspected Jones' pharmacy on several occasions. Because he received two consecutive unsatisfactory inspection scores and had violations the Board found were an immediate danger to the public, it summarily suspended Jones' licenses. He eventually entered into a stipulated order agreeing to a five year suspension of his

pharmacy license. Jones later sued the Board, Donald Williams, the Board's Executive Director, and investigators Phyllis Wene and Stan Jeppesen for numerous torts and violation of his civil rights under 42 U.S.C. § 1983. On summary judgment, the trial court denied the Department of Health's (Department) motion to dismiss Jones' claims and ruled that none of the individual defendants were entitled to immunity. We granted discretionary review of these rulings.

We hold there was no basis in law to deny immunity to the individual defendants. Williams, who functioned as a prosecutor when filing the summary suspension and statement of charges against Jones, was entitled to absolute immunity. Because Jones failed to establish any violation of a constitutional right, Wene and Jeppesen should have been granted qualified immunity and the section 1983 claims dismissed. Finally, the trial court erroneously denied the Department's motion for summary judgment on the state law torts because Jones failed to exhaust available administrative remedies.

We therefore reverse and remand for entry of an order granting the Department's motion dismissing Jones' suit.

#### FACTS

In 1995, Michael Jones, a licensed pharmacist, purchased a pharmacy franchise, The Medicine Shoppe, and obtained a pharmacy license. Jones was the only licensed pharmacist at this pharmacy. On December 17, 1998, the Board inspected The Medicine Shoppe and gave it a failing inspection score of 79. This inspection uncovered the following violations:

[1] Failing to obtain chronic conditions on patients of the pharmacy;

[2] Dispensing the majority of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber;

[3] Various records required by state and federal law were either inaccurate, incomplete or not available;

[4] There was a box of filled prescription containers, many unlabeled, on the floor of the pharmacy.

[5] Investigator Wene discovered a prescription filling error in the will call area. . . .;

[6] Many of the prescriptions in the will call area had labeled expiration dates exceeding the manufacturer's expiration date;

[7] Most of the prescriptions in the will call area contained the incorrect NDC number for the product in the prescription container[.]

Board of Pharmacy Investigator Phyllis Wene reinspected the pharmacy on February 3, 1999, and gave it a passing score of 94. The inspectors deducted points for inaccurate, incomplete or missing records.

On July 12, 1999, Inspectors Wene and Stan Jeppesen inspected The Medicine Shoppe and gave it an unsatisfactory score of 48 for the following violations:

[1] Failing to obtain chronic conditions and allergies on patients of the pharmacy. Disease state management . . . not readily readable by the Pharmacist[;]

[2] Numerous (greater than 10) prescriptions were labeled with a different generic product than indicated on the label or NDC Code. Several of these prescriptions were dispensed in the presence of Board of Pharmacy Investigators[;]

[3] Dispensing the majority (in excess of 90%) of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber for non child-resistant packaging[;]

[4] Thirty-eight (38) drug products were outdated. Of those, 18 drugs were legend or controlled substances and 20 were OTC products[;]

[5] Various records required by federal law (DEA [Drug Enforcement Administration]) were either inaccurate, incomplete or not available. DEA order forms and invoices could not be reconciled. Respondent was unable to locate several required DEA forms. There was poor organization of DEA inventory records, including non-sequential filing. Several DEA records did not include date and amount received on DEA 222 forms[;]

[6] DEA Inventory incomplete, DEA inventory for Schedules III-V was missing. Respondent was unable to generate reports for Schedule II drugs. The daily refill reports were not signed, stored in various locations, out of sequence, with several months not located[;]<sup>1</sup>

[7] Facts and Comparisons, the only reference source in the pharmacy, had not been updated for at least nine (9) months[;]

[8] Pharmacy Assistant did not have a name badge and none had been ordered. No Pharmacy Assistant certificate has been generated or signed. Modifications to the Pharmacy Assistant Utilization Plan were in place without Board approval[;]

[9] The prescription records were inaccurate, missing and poorly organized. Examples include prescription files with non-sequential order. Several prescriptions, both C-II and other drugs were unaccounted for. Prescription files were kept with no organization. Respondent Jones was unable to locate files in a timely manner[;]

[10] Minimum procedures for utilization of the patient medication system were inadequate[;]

[11] During the inspection, patient returned a prescription so that Respondent Jones could correct the instructions for use. The correction was made but no audit trail of the change was entered in the pharmacy computer[;]

[12] The pharmacy was generally disorganized and dirty. The pharmacy sink and immediate area were dirty and with numerous dirty food dishes.

Wene and Jeppesen reinspected the pharmacy on August 10, 1999, and gave it another unsatisfactory score of 56 based on several wrongly filled prescriptions and the following non-exhaustive list of violations:

[1] Six prescriptions selected randomly in the will call area did not have allergy or chronic conditions noted in the patient profile. The disease state - drug interaction fields [on the computer] had been turned off. Respondent Jones was unable to explain the purpose or the clinical significance of the clinical interaction levels that appeared for drug interaction messages[;]

[2] Three prescriptions selected randomly from the will call area were labeled with a different generic product than indicated on the label and/or NDC Code[;]

[3] Forty-one (41) prescriptions were located in the will call area. Of those, forty (40) were packaged in non child-resistant containers and the

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<sup>1</sup> Findings 4-6 refer to drugs classified as narcotics and other controlled substances under state and federal law.

one that was in a child resistant container was in a container supplied by the manufacturer[;]

[4] Eleven legend or controlled substances on the shelf were beyond the manufacturer's expiration date[;]

[5] As in the July 12, 1999 inspection, various records required by federal law (DEA) were either inaccurate, incomplete or not available. . . .

[6] DEA Inventory records were incomplete. . . .

[7] Five prescriptions which had been filled and returned to the stock area were checked for accuracy of product on the label and against correct NDC numbers. All five prescriptions failed to comply with state and/or federal law. . . .

On August 16, 1999, Board of Pharmacy Executive Director Donald Williams filed a statement of charges and an ex parte motion for an Order of Summary Suspension of Jones' and The Medicine Shoppe's licenses and with the Board of Pharmacy. The next day, the Board granted the summary suspension motion, and Wene served Jones with the Statement of Charges, Ex Parte Order of Summary Action and a Notice of Opportunity of Settlement and Hearing.

On August 30, 1999, Jones filed a Motion to Modify and Stay the summary suspension, contesting the allegations. To support this motion, he filed his own declaration and one from his attorney which stated that the inspectors acted unprofessionally during their inspection and assured the Board of Pharmacy that he held his patients' safety in the highest regard. He argued that, while he may have been disorganized, his actions did not constitute unprofessional conduct or represent any threat to the health, safety, or welfare of his customers. He also claimed that portions of the inspection report were inaccurate. For example, he asserted the August 1999 report penalized him twice for prescriptions without proper NDC numbers because those same prescriptions had been in the pickup bin since the time of the first inspection. He maintained that his recordkeeping on non child resistant caps may have

been difficult to verify but did not pose a safety concern. He demanded immediate reinstatement of his licenses in order to avoid severe financial hardship. Effective August 31, 1999, The Medicine Shoppe International terminated Jones' franchise because of the summary suspensions.

On September 2, 1999, the Presiding Officer conducted a telephone conference with the parties. During this conference, Jones asked the Board to consider his motion as soon as a meeting time could be arranged, but he elected not to present oral argument. The Presiding Officer told Jones that by filing a written motion he had waived his right to the prompt hearing set for September 10, 1999, but he could move for an expedited hearing if his motion was denied.

On September 7, 1999, a three member panel of the Board denied Jones' motion, finding that he had committed serious violations by operating the pharmacy below the standard of care. The Board ruled that the summary suspension would remain effective because Jones had a history of violating pharmacy laws, correcting those violations, and later violating other pharmacy laws.

On September 13, 1999, Jones petitioned for an expedited hearing, asserting that he would suffer financial ruin if he could not resolve the matter and immediately reopen his pharmacy. In his motion, Jones acknowledged that he was no longer entitled to have the matter heard on the prompt hearing calendar. The Department objected to his request to set the matter outside the Board's regularly scheduled hearing dates because he had waived his right to a prompt hearing. Although the Board's Presiding Officer granted Jones' motion and scheduled the hearing for October 21, 1999, he also noted that Jones had waived his right to a prompt hearing in his Answer.

On September 22, 1999, Jones requested an immediate settlement conference to resolve the charges. The parties met at an October 13 prehearing conference, at which time another prehearing conference was set in order to allow the Department time to amend the Statement of Charges against Jones. The Department also moved for a continuance to the Board's next regularly scheduled meeting on December 2, 1999. Jones opposed the motion on the ground that additional delay would cause him greater financial hardship. The Presiding Officer granted the Department's motion to continue because the later hearing date would further judicial economy by allowing joinder of additional pending charges. The Presiding Officer also ruled that Jones' actions were a risk to the public. He rescheduled the hearing to the Board's next meeting date. A new prehearing conference was scheduled for November 11, 1999.<sup>2</sup>

On January 11, 2000, Jones entered into Stipulated Findings of Fact, Conclusions of Law, and an Agreed Order, under which he agreed that the facts contained in the investigators' reports from December 1998, July 1999, and August 1999 constituted unprofessional conduct. Under the terms of the order, the Board revoked Jones' pharmacy license for The Medicine Shoppe and suspended his professional license for five years from February 17, 2000.<sup>3</sup>

Jones filed a complaint in Snohomish County Superior Court against Executive Director Williams, investigators Wene and Jeppesen, the State, the Department of Health and the Board of Pharmacy seeking injunctive relief and monetary damages for

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<sup>2</sup> Jones alleges that by November, he had lost his entire business, his franchise, and his commercial lease.

<sup>3</sup> On appeal, Jones argues he signed the stipulated order because he no longer had the financial wherewithal to pay for an attorney and challenge the Board of Pharmacy and could not afford risking his professional license.

negligence, reckless investigation, tortious interference with a business expectancy, and violation of his due process rights under 42 U.S.C. § 1983. The Department moved for summary judgment, arguing that Executive Director Williams was entitled to absolute prosecutorial immunity and that all individual defendants were entitled to qualified immunity on Jones' civil rights claims. It moved for summary dismissal of all of Jones' state law claims because he had agreed to the license suspension and waived additional hearing rights when he signed the stipulated order. The Department also filed a motion to strike portions of Jones' declarations as hearsay. These included Jones' rendition of out-of-court statements by pharmacists Sharla Keeling and Claudia Tomlinson and conversations between his attorney, Bernie Bauman, and members of the Board.

The court partially granted the Department's motion for summary judgment, dismissing Jones' claims for negligent investigation and injunctive relief.<sup>4</sup> But it denied the Department's motion on the remaining claims, ruling that the defendants were not entitled to absolute or qualified immunity and that the stipulation did not preclude Jones from asserting tort claims against the Department. The trial court granted the Department's motion to strike the hearsay portions of Jones' declaration. But, it said it would consider portions of his declaration as "background." On February 13, 2000, the Department filed a motion for reconsideration. On May 17, 2000, the trial court granted the Department's motion in part, dismissing Jones' claim for recklessness based on his agreement that the claim should be dismissed. We granted discretionary review of the

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<sup>4</sup> Jones agreed to dismiss his claim for injunctive relief and did not oppose the Department's motion to dismiss his claims for negligent investigation.

court's rulings on immunity and Jones' remaining state tort law and 42 U.S.C. § 1983 claims.

## DISCUSSION

We review summary judgment orders de novo, making the same inquiry as the trial court and considering all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>5</sup> Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>6</sup> A material fact is one upon which the outcome of the litigation depends.<sup>7</sup> Questions of fact may be determined as a matter of law when reasonable minds can reach only one conclusion.<sup>8</sup>

The Department asserts that the trial court made an error of law by failing to grant its motion for summary judgment and dismiss all claims against Williams, Wene, and Jeppesen. It argues that these defendants were entitled to immunity and that RCW 18.130.050 expressly authorized the Board to summarily suspend Jones' licenses because his violations posed a danger to the public. According to the Department, Williams, Wene, and Jeppesen are entitled to immunity because pharmacy regulators must be allowed to act independently and without fearing liability when performing their duty to ensure that Washington pharmacists comply with state and federal health and safety laws.

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<sup>5</sup> Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 827, 965 P.2d 636 (1998) (citing Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)).

<sup>6</sup> CR 56(c); City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

<sup>7</sup> Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

<sup>8</sup> Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985) (citing La Plante v. State, 85 Wn.2d 154, 531 P.2d 299 (1975); Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963)).

I. Absolute Immunity

The Department argues that the trial court erred as a matter of law by not conferring absolute immunity on Executive Director Williams and dismissing all claims against him because Jones' claims against him are premised on prosecutorial conduct. The Department asserts that absolute prosecutorial immunity is not limited to prosecuting attorneys but extends to administrative agency officials who initiate disciplinary proceedings. We agree.

Whether a government official is entitled to absolute immunity is a question of law that can be properly decided on summary judgment.<sup>9</sup> In Hannum v. Freidt, we held that the Director of the Department of Licensing (DOL) was entitled to prosecutorial immunity because she performed a prosecutorial function when she charged Hannum and summarily suspended his vehicle dealer license.<sup>10</sup> We also held that a DOL Investigator was entitled to absolute immunity because she acted in a prosecutorial role when she recommended summary suspension of Hannum's dealer license.<sup>11</sup> These rulings reflect the policy that administrative agency officers who initiate administrative adjudications should be shielded by absolute prosecutorial immunity because the discretion they exercise when initiating an adjudicative matter "might be distorted if their immunity from damages arising from that decision was less than complete."<sup>12</sup>

Jones argues that Hannum does not apply because DOL agents are authorized by statute to summarily suspend driver's licenses and the Executive Director of the

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<sup>9</sup> Hannum v. Freidt, 88 Wn. App. 881, 887, 947 P.2d 760 (1997).

<sup>10</sup> 88 Wn. App. 881, 889, 947 P.2d 760 (1997).

<sup>11</sup> Id.

<sup>12</sup> Id. at 888-89 (quoting Butz v. Economou, 438 U.S. 478, 515, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)).

Board of Pharmacy is not. He also asserts that Williams' role was investigatory, not prosecutorial, because an Assistant Attorney General prosecuted the case.

Absolute prosecutorial immunity is proper when an official's conduct is the functional equivalent of the acts a prosecutor would perform in the course of deciding whether to prosecute and initiating prosecution. The official need not do everything a prosecutor would do.<sup>13</sup> The Administrative Procedures Act applies to the adjudicative procedures of the Board of Pharmacy.<sup>14</sup> Whether or not an Assistant Attorney General brought the case before the Board, Williams' recommendation to summarily suspend Jones' licenses was no different from the actions of the DOL investigator in Hannum, who was entitled to absolute prosecutorial immunity for substantially the same decisions and actions. Charging decisions and filing a Statement of Charges are traditional prosecutorial functions.<sup>15</sup> When an administrative officer exercises discretion in deciding whether to suspend a license, that officer is also entitled to absolute immunity. Jones' presented no evidence to show that Williams participated in the investigation, directed Wene's and Jeppesen's actions or did anything other than decide that summary suspension was warranted. Accordingly, we hold that the trial court made an error of law by not granting the Department's motion to dismiss Executive Director Williams from the lawsuit based on absolute immunity.

## II. Qualified Immunity § 1983 Claims

The Department argues that all three defendants were entitled to qualified immunity, and the trial court should have dismissed them on that basis because Jones

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<sup>13</sup> See id.

<sup>14</sup> RCW 18.13.100; WAC 246-869-001.

<sup>15</sup> Kalina v. Fletcher, 522 U.S. 118, 127, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997).

failed to show the violation of a clearly established constitutional right. It also contends the trial court should have dismissed this action because RCW 18.130.050(7) expressly authorizes summary suspension, without a pre-deprivation hearing, under emergency circumstances. While it is not entirely clear what constitutional right Jones relies on for his section 1983 claims, his allegations and briefing appear to allege that he was denied procedural due process.

Qualified immunity protects government officials from insubstantial and harassing litigation without foreclosing suits for damages that may be the only avenue for the vindication of constitutional rights.<sup>16</sup> Qualified immunity is a judicially created doctrine that stems from the premise that few people would enter public service if it entailed the risk of personal liability for official decisions.<sup>17</sup> Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."<sup>18</sup> Immunity, whether absolute or qualified, "spare[s] a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."<sup>19</sup>

Defendants are entitled to summary judgment based on qualified immunity if plaintiffs' complaint fails to state a claim<sup>20</sup> or, in light of clearly established principles governing their conduct, they objectively could have believed their conduct was lawful,<sup>21</sup> or when there is no genuine issue of material fact about whether they engaged in

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<sup>16</sup> Robinson v. City of Seattle, 119 Wn.2d 34, 62, 830 P.2d 318, cert. denied, 506 U.S. 1028 (1992).

<sup>17</sup> Malley v. Briggs, 475 U.S. 335, 339, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).

<sup>18</sup> Hunter v. Bryant, 502 U.S. 224, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (quoting Malley, 475 U.S. at 343).

<sup>19</sup> Siegert v. Gilley, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

<sup>20</sup> Id. at 233.

<sup>21</sup> Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

conduct violating a plaintiff's clearly established constitutional rights.<sup>22</sup> Once the defendant asserts qualified immunity, the plaintiff must establish that the defendant violated a clearly established constitutional right in order to survive summary judgment.<sup>23</sup> Jones claims the individual defendants violated his due process rights when they suspended his licenses. But the suspension was authorized by law, and we conclude that none of the defendants violated Jones' right to due process, and they are thus entitled to qualified immunity.

WAC 246-869-190 authorizes the Board of Pharmacy to inspect Washington pharmacies.<sup>24</sup> When a pharmacy receives an unsatisfactory score, it must raise its score to a satisfactory level score of 90 or better within 14 days.<sup>25</sup> RCW 34.05.479 authorizes agencies to use emergency adjudicative actions when there is an immediate danger to the public health. In July 1999 and again in August 1999, Jones received an unsatisfactory score, even though he had been given an opportunity to correct his violations. Upon reinspection, the investigators found that several of the violations were still not addressed, including DEA records for Schedule II drugs and records of customer requests for non child resistant containers (non-CRCs). The investigators also found prescriptions with incorrect NDA numbers in the customer pickup bins, which Jones admitted had been there since the time of the last inspection.<sup>26</sup> While he claimed

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<sup>22</sup> Burgess v. Pierce County, 918 F.2d 104, 106 n.3 (9th Cir. 1990).

<sup>23</sup> Id.

<sup>24</sup> During inspections, pharmacies are scored on a 0 to 100 scale and classified into three categories: "Class A" for scores from 90-100; "Conditional" for scores from 80-89; and "Unsatisfactory" for scores below 80. WAC 246-869-190(3)(a)(b)(c).

<sup>25</sup> WAC 246-869-190(5).

<sup>26</sup> To support the Pharmacy Board's finding of an emergency necessitating summary suspension of a pharmacy license, the Department cites to numerous cases involving acts similar to Jones' admissions. These examples include prosecution under the Controlled Substances Act for the type of insufficient Schedule II records Jones acknowledged, see, e.g.,

in this lawsuit that the inspection reports were in error, his August 1999 declarations admitted these facts were true. RCW 34.05.479 expressly authorizes the agency to use emergency adjudicative actions when there is an immediate danger to the public health. And under RCW 18.130.050(7), WAC 246-869-190(8) and WAC 246-11-300, the Board can take emergency action and summarily suspend a pharmacist's license pending further disciplinary proceedings if, after reviewing the evidence, it determines that only summary action will address an immediate danger to public health, safety, or welfare. Given the serious nature of the violations, the Board had statutory authority to summarily suspend Jones' licenses.

Jones argues that the Board violated his due process rights, apparently because he did not receive a pre-deprivation or expedited hearing.<sup>27</sup> Where an individual possesses a constitutional property interest, due process requires that he be given notice and a meaningful opportunity to a hearing before he is deprived of that interest.<sup>28</sup> We must balance three factors to determine the nature of the procedural protections required: (1) the gravity of the private interest affected; (2) the risk of erroneous deprivation under the current procedure and the probable value, if any, of additional

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United States v. Poulin, 926 F. Supp. 246 (D. Mass. 1996), and cases demonstrating real harm to individual patients when a pharmacist failed to keep proper records. See, e.g., Wahba v. H & N Prescription Ctr., Inc., 539 F. Supp. 352 (E.D.N.Y. 1982) (two year old died after ingesting 20 pills that were dispensed to mother by pharmacist in non child resistant container); Baker v. Arbor Drugs, 215 Mich. App. 198, 544 N.W.2d 727 (1996), appeal denied, 454 Mich. 853 (1997) (pharmacy patient suffered stroke after pharmacist filled prescriptions for two incompatible drugs because pharmacist failed to properly utilize computer system that would have warned of the adverse drug reaction).

<sup>27</sup> Jones also asserts that the defendants participated in a conspiracy against him to destroy his business and filed a summary suspension based on false accusations. He contends Wene and Jeppesen were highly unprofessional and instituted proceedings against him based on an arbitrary scoring system. Jones did not present any admissible evidence to support these allegations below. Accordingly, we do not address any allegations that the defendants violated his right to substantive due process.

<sup>28</sup> Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

procedural safeguards; and (3) the interest of the government, including the burdens of additional or substitute procedures.<sup>29</sup> As discussed above, the governmental interest here was important because Jones' violations threatened the health and well-being of his patients. And he received all the process that was due. Jones received notice of the summary suspension and of all later charges and hearings associated with his professional licenses. He was represented by counsel. Twenty-one days after the summary suspension, a three member panel of the Pharmacy Board heard his motion to stay and modify the summary suspension order. Each time Jones and his pharmacy received a failing score, the Board reinspected the pharmacy in accordance with WAC 246-869-190. Finally, when the Board issued the summary suspension, Jones had an opportunity to be heard before the Board at a September 10, 1999 prompt hearing.

Once a summary suspension is filed, under WAC 246-11-330 a pharmacist can respond in several ways:

- (1) Request a prompt adjudicative proceeding conducted in accordance with this chapter; or
- (2) Waive the prompt adjudicative proceeding and request a regularly scheduled adjudicative proceeding conducted in accordance with this chapter;
- (3) Waive the right to an adjudicative proceeding and submit a written statement to be considered prior to the entry of the final order; or
- (4) Waive the opportunity to be heard.

By filing his motion to stay and modify the order and failing to request a prompt hearing within 10 days of service, Jones waived his right to a prompt hearing and knew that he was doing so when he filed his motion. Had he sought a prompt hearing, Jones would have had an opportunity to meet with the Board in mid-September and may have avoided the damages he now alleges. Nor did the Department violate his right to due

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<sup>29</sup> Mathews, 424 U.S. at 335.

process simply because it opposed his later motion for an expedited hearing. Finally, Jones also waived his opportunity for a more extensive hearing on the merits of his suspended licenses by stipulating to a five year suspension before the scheduled hearing could take place. No further process would have protected Jones' rights, even if he had not waived his right to an early hearing. Jones failed to raise a material issue of fact or to establish that he was entitled to more process than he received. Under the Matthews test, there was no violation of Jones' rights. Wene and Jeppesen were therefore entitled to qualified immunity. The trial court erred in denying the Department's motion to dismiss the claims against them.

### III. Evidentiary Rulings

The Department asserts the trial court erred by ruling there were genuine issues of material fact based on Jones' declaration because it contained inadmissible hearsay and contradicted the earlier declarations he submitted to the Board, a quasi-judicial body. It also asserts that the trial court should have applied the doctrine of judicial estoppel to Jones' declaration because it contradicted earlier declarations. Jones asserts that the declarations were admissible because evidence not offered for the truth of the matter asserted is not hearsay under ER 801(c). We disagree with Jones' position.

On summary judgment, the court's function is to determine whether a genuine issue of material fact exists; it is not to resolve an existing factual issue.<sup>30</sup> When ruling on a summary judgment motion, a court cannot consider inadmissible evidence.<sup>31</sup>

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<sup>30</sup> Thoma v. C. J. Montag & Sons, Inc., 54 Wn.2d 20, 337 P.2d 1052 (1959).

<sup>31</sup> CR 56(e); King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

Here, the trial court granted the Department's motion to strike the hearsay portions of Jones' declaration submitted in opposition to the Department's motion for summary judgment, considering it only for "background" but "not for the truth of the matter asserted." We hold that the trial court properly granted the motion to strike, but it erred by considering the hearsay portions of Jones' declarations for any purpose. Because we are reversing any of the trial court's rulings that may have been based on inadmissible hearsay, we need not address the matter further.<sup>32</sup>

#### IV. Exhaustion of Administrative Remedies

The Department next asserts the trial court erred as a matter of law by holding that Jones' state law claims were not precluded by his stipulations. Relying on Laymon v. Dep't of Natural Resources,<sup>33</sup> it also contends these claims should have been dismissed because Jones failed to exhaust his administrative remedies. And because Jones derived a benefit from his agreement to a five year license suspension and the Pharmacy Board relied on the agreement when it signed the order, the Department argues that Jones should not be allowed to take a position inconsistent with the statements he made before the Pharmacy Board.

Jones argues that he was not required to exhaust his administrative remedies because doing so would not have mitigated his damages. He claims the defendants issued false investigation reports against him and his pharmacy, and the Department opposed his effort to effectively use the administrative process to challenge the summary suspension by opposing his motion for an expedited hearing. Because he

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<sup>32</sup> We decline to address the Department's arguments concerning any allegedly contradictory statements within Jones' declarations because it did not raise this objection below.

<sup>33</sup> 99 Wn. App. 518, 994 P.2d 232 (2000).

had lost his pharmacy franchise, commercial lease, and business before the scheduled hearing, Jones contends that the administrative remedies available to him would not have prevented the harm he suffered. He asserts he entered into the Stipulated Order because he could not afford to proceed against the Board. And he argues that he neither admitted to the facts nor waived his right to sue the defendants by agreeing to the Stipulated Order.

It is well settled law that a party aggrieved by governmental action must exhaust available administrative remedies before filing suit unless he can establish that doing so would be futile.<sup>34</sup> When an aggrieved person fails to seek redress using available administrative procedures before filing suit, the trial court should dismiss the claim.<sup>35</sup> In Laymon, we affirmed the trial court's ruling dismissing the plaintiff's claims on summary judgment for failure to exhaust his administrative remedies. Laymon sued the Department of Natural Resources (DNR), the Department of Fish and Wildlife (DFW), and the State for administrative negligence. DNR issued a stop work order for logging on his land based on a report that a bald eagle nest site was located on the property.<sup>36</sup> Ten days after it issued the stop work order, DNR presented Laymon with a draft bald eagle management plan that placed significant restrictions on his planned development.<sup>37</sup> Despite his insistence that there could be no bald eagle on or adjacent to his property, Laymon's financial backers withdrew from the project, and he suffered

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<sup>34</sup> Laymon, 99 Wn. App. at 525 (citing CLEAN v. City of Spokane, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997), cert. denied, 525 U.S. 812 (1998)).

<sup>35</sup> Id.

<sup>36</sup> Id. at 522.

<sup>37</sup> Id.

financial loss. Six months later, DFW determined that the bald eagle nest never existed.<sup>38</sup> Laymon did not pursue any avenue of administrative appeal.

Jones argues that Laymon is distinguishable because, even if Jones had pursued administrative remedies, he could not have saved his business. But Jones' arguments are not supported by the record. He waived his right to a prompt hearing when he failed to request one and file a written response to the summary license suspension within the 10 day time limit.<sup>39</sup> Rather than request a prompt adjudicative proceeding, Jones filed a Motion to Modify and Stay the Summary Suspension. Only after this motion was denied did he request an expedited hearing. By that time, he was no longer entitled to a hearing date outside the Pharmacy Board's regular schedule.<sup>40</sup>

Under our holding in Phillips v. King County, plaintiffs must exhaust their administrative remedies when an agency's rules set out a clearly defined process for resolving the aggrieved party's complaint.<sup>41</sup> This doctrine is based on the principle that the judiciary should give proper deference to agency expertise and allow the agency to develop the necessary factual background in order to correct its own errors.<sup>42</sup> Had Jones requested a prompt hearing, he could have immediately challenged the Statement of Charges and the Pharmacy Board could have evaluated the accuracy of the investigators' report. But Jones waived his right to a prompt hearing on September 10, 1999, and was not entitled to an expedited hearing before the next regularly

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<sup>38</sup> Id. at 523.

<sup>39</sup> WAC 26-11-340(3).

<sup>40</sup> WAC 246-11-340(2) provides: "Any respondent affected by a summary action may request [a] prompt adjudicative proceeding, may elect a regularly scheduled adjudicative proceeding instead of a prompt adjudicative proceeding, or may waive the opportunity for adjudicative proceeding in accord with WAC 246-11-270."

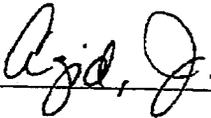
<sup>41</sup> 87 Wn. App. 468, 479, 943 P.2d 306 (1997), aff'd, 136 Wn.2d 946 (1998).

<sup>42</sup> Id. at 479-80.

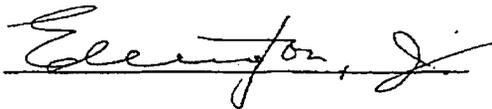
scheduled date. The delay that took place between the date when the prompt hearing could have been held and the date the adjudicative hearing was ultimately scheduled was not caused by the Department or the individual defendants but by Jones' own strategic decisions. We hold that the trial court erred by finding that his state law claims could proceed despite his failure to exhaust his administrative remedies.<sup>43</sup>

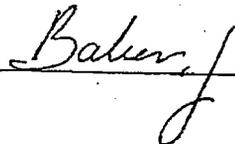
CONCLUSION

We reverse and remand for entry of an order granting the Department's motion dismissing Jones' suit.

  
\_\_\_\_\_

WE CONCUR:

  
\_\_\_\_\_

  
\_\_\_\_\_

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<sup>43</sup> As part of his respondent's brief, Jones moved to strike the Department's reference to all out-of-state cases on the ground that reliance on these cases is not probative of any issue in this case. Jones does not cite any authority to support his motion. The Department's citations are relevant, and we deny the motion.

## **Appendix B**

**PHARMACY INSPECTION REPORT**  
 DEPARTMENT OF HEALTH  
 WASHINGTON STATE BOARD OF PHARMACY  
 1300 CLUNCE ST., S.E.; P. O. BOX 47883  
 OLYMPIA, WASHINGTON 98504-7883  
 TEL: 360/236-4825 FAX: 360/686-4358

INSPECTION PURPOSE  
 NEW  
 PERIODIC  
 OWNER CHANGE  
 LOCATION CHANGE  
 RE-INSPECTION  
 SELF

7-13-1999  
 INSPECTION DATE  
PA 10995  
 LICENSE NUMBER

TELEPHONE NUMBER (Include Area Code)

MICHAEL S. JONES  
 RESPONSIBLE MANAGER

LAST INSPECTED: 2-3-1999 CLASS A OWNERSHIP: 1 C F B PHARMACY TYPE: U H F L H O

**A. GENERAL REQUIREMENTS (10 POINTS)**

<input checked="" type="checkbox"/> PHARMACY INSPECTION CERT. POSTED (WAC 246-846-020)	<input checked="" type="checkbox"/> PHARMACY LICENSES POSTED (RCW 18.46.020)	LOCATION LICENSE NUMBER <u>CF 53751</u>
<input checked="" type="checkbox"/> PHARMACY LICENSES POSTED (RCW 18.46.020)	<input checked="" type="checkbox"/> DCA REGISTRATION (WAC 246-847-020)	REGISTRATION NUMBER <u>BT 5108041</u>

PHARMACEUTICALS	LICENSES	RECEPTOR	INTERNS & TECHNICIANS	CERTIFICATE	INTERIOR OR TILES
			<u>Shannon Boston - 2006LX</u>		

UP TO 1 POINTS SUBTRACTED FOR EACH DEFICIENCY (SEE ADDITIONAL PAGE IF NECESSARY) SECTION A TOTAL 0

**B. PATIENT HEALTH & SAFETY REQUIREMENTS (30 POINTS)**

<input checked="" type="checkbox"/> PATIENT MED. RECORDS (WAC 246-846-020)	<input checked="" type="checkbox"/> OTC COMPLIANCE (WAC 246-846-020)	NUMBER OF OUTDATED ITEMS
<input checked="" type="checkbox"/> PATIENT INFORMATION (WAC 246-846-020)	<input checked="" type="checkbox"/> POISON REQUIREMENTS (WAC 246-846-020)	00 TO 09 ITEMS = 30 POINTS
<input checked="" type="checkbox"/> OTC PRODUCT SUBSTITUTION (RCW 18.46.020)	<input checked="" type="checkbox"/> PCGAS BYR/ROBORN CONTROL (WAC 246-846-020)	10 TO 17 ITEMS = 25 POINTS
	<input checked="" type="checkbox"/> OUTDATED/OBSOLETE STOCK (WAC 246-846-020)	18 TO 25 ITEMS = 20 POINTS
		26 PLUS ITEMS = 10 POINTS

UP TO 3 POINTS SUBTRACTED FOR EACH DEFICIENCY SECTION B TOTAL 0

**C. PROFESSIONAL REQUIREMENTS (40 POINTS)**

<input checked="" type="checkbox"/> DCA ORDER FORMS (WAC 246-847-020)	<input checked="" type="checkbox"/> LABBOOK (WAC 246-846-020)	<input checked="" type="checkbox"/> ALL DRUGS PROPERLY LABELED (WAC 246-846-020)
<input checked="" type="checkbox"/> DCA INVENTORY RECORD (WAC 246-847-020)	<input checked="" type="checkbox"/> REFERENCE SOURCE (WAC 246-846-020)	<input checked="" type="checkbox"/> COMPLETED PRESCRIPTION LABELS (WAC 246-846-020)
<input checked="" type="checkbox"/> SCHEDULE V CS REGISTER (WAC 246-847-020)	<input checked="" type="checkbox"/> PHARMACY ANCESTRY STATE (WAC 246-846-020)	<input checked="" type="checkbox"/> PRESCRIPTION FILES (WAC 246-846-020)
<input checked="" type="checkbox"/> POLYGRAPHIC (WAC 246-846-020)	<input checked="" type="checkbox"/> PROFESSIONAL RESPONSIBILITIES (WAC 246-846-020)	<input checked="" type="checkbox"/> REGULATION COMPLIANCE (WAC 246-846-020)

UP TO 5 POINTS SUBTRACTED FOR EACH DEFICIENCY SECTION C TOTAL 19

**D. FACILITIES (20 POINTS)**

<input checked="" type="checkbox"/> OPERATIONAL HOURS (WAC 246-846-020)	<input checked="" type="checkbox"/> PRESCRIPTION AREA SIGN (WAC 246-846-020)	<input checked="" type="checkbox"/> GENERAL CLEANLINESS & SANITATION (WAC 246-846-020, 182A 170)
<input checked="" type="checkbox"/> RX AREA SECURED FROM PUBLIC (WAC 246-846-020)	<input checked="" type="checkbox"/> REPRODUCTION (WAC 246-846-020)	<input checked="" type="checkbox"/> NECESSARY EQUIPMENT (WAC 246-846-020)
<input checked="" type="checkbox"/> APPEARANCE OF STAFF (WAC 246-846-020)	<input checked="" type="checkbox"/> TRASH RECEPTACLES (WAC 246-846-020)	
<input checked="" type="checkbox"/> RX AREA WORKING SPACE (WAC 246-846-020)	<input checked="" type="checkbox"/> REST ROOMS (WAC 246-846-020)	

UP TO 2 POINTS SUBTRACTED FOR EACH DEFICIENCY SECTION D TOTAL 19

100 TO 99 POINTS = A      80 TO 70 POINTS = CONDITIONAL (WAC 246-846-020)      BELOW 80 POINTS = UNSATISFACTORY

Michael Jones  
 Signature of Pharmacist

COMMENTS: YES NO  
 Comments are set forth on the reverse side of this report.

GRADE TOTAL 48  
Stan Johnson  
 Signature of Inspector

WASHINGTON STATE BOARD OF PHARMACY

MEMORANDUM

DATE: July 15, 1999  
TO: Richard Morrison, Chief Investigator  
FROM: Stan Jeppesen, Investigator  
SUBJECT: The Medicine Shoppe  
9430 State Avenue  
Marysville, Wa 98272  
License Number CP 55751  
Notes regarding the Unsatisfactory Inspection on July 13, 1999

The following is provided as background notes regarding the unsatisfactory inspection of the Medicine Shoppe Pharmacy, owned and operated by Mr. Michael Jones, in Everett Washington.

Description of Facilities:

The shop is located in a converted bank building on the west side of State Avenue in Marysville, Washington, standing alone, but in a small strip mall, and cross the street from another shopping center. The building has a bank style drive through window area, located on the west side, that that is used to pass patient prescriptions to vehicular occupants and complete monetary transactions. Additional parking for patients is provided on the west side of the building where Mr. Jones parks his personal vehicle and the store Medicine shoppe vehicle use to deliver prescriptions and make errands. The main entrance is located on the North side of the building, and enters into a waiting area that also contains OTC drug products. The prescription processing area is immediately south of the waiting area, enabling the Pharmacist to see people coming into the pharmacy, unless you are standing or sitting at the computer terminal located to the far east of the prescription counter, which has a barrier in front, restricting view of the entrance.

The prescription stock area, is located immediately behind (and south) of the prescription counter, and is composed of three banks of shelves, approx. 6 feet long and approx. 7 feet high. The Rx area is predominately stocked with generic medications, usually only one generic brand, unless a partial exists of another brand. A few fast movers are stored on the front counter to include Hydrocodone, Viagra, and Propecia; Lanoxin, Atenolol, Carisoprodol, etc.

EXHIBIT 7  
Page 1 of 4

04131915

The prescription will-call area is located behind the cash register, located on the west end of the prescription counter. Rx bottles are stored alphabetically with a Rx receipt. Immediately to the south of the will-call storage wall is the bathroom, and south of the bathroom is a small utility area with a sink, shelves, cabinets and refrigerator for personal use.

When coming into the Pharmacy initially, Mr. Jones immediately recognized Phyllis Wene, and I was introduced to Mr. Jones. Shannon Boston, the Level "B" assistant, did not have a name badge, and Mr. Jones, very soon focused on the name badge that Shannon did not have. Through additional discussion it was learned that Shannon has only been hired a week ago, had no name badge, and no level B Certificate had been signed. When issues regarding the documentation of CRC caps was brought up, Mr. Jones retrieved the small (3x5) blue three ring binder where he had patients sign for authorization to have non-safety caps dispensed. Mr. Jones brought up the notebook with Shannon, as normal procedure for having patients sign the book, but Shannon appeared to be hearing the information for the first time. The CRC book is divided into alphabetic sections, with several to many pages of signatures listed down each page, on both sides. Many signatures are difficult to impossible to read, and are not in alphabetic order within the section. One Rx shelf was selected, the "B's", and a search of patient signatures in the book was made, with. Prescriptions for seven different patients were checked and only two signatures for patients in the book could be found.

Refill requests are taken on a refill request log, and labels printed from the computer. Mr. Jones stated that at times he will print labels for medications and at times refill medications not requested or intended pick-up by mistake, when refill requests are called in for example to "refill all my medications". One such case was noted for [redacted] for a [redacted] for \$75.01. This prescription refill was noted to be deleted from the system with no further tracking available. Daily logs showed a duplicate prescription # [redacted] one charged for \$26.09 and other for \$38.24. When Mr. Jones was questioned about the duplicate charge, Mr. Jones explained that [redacted] was a Welfare patient, and that it did not really matter, as the state would reject one, and only pay for one Rx.

Numerous times during the day of 7-12-99, while we were on present, Mr. Jones informed patients that he would need to order a medication in, and that it would be available in a day or two. At least eight prescription vials were found on the will-call shelves with partial amounts, with the date often at least two weeks old. Mr. Jones Rx stock appears to be minimal, especially from the numerous requests that he took to be ordered in. One patient [redacted] returned on 7/12 to complain that Mr. Jones has filled [redacted] Rx with only one-half the amount needed. Mr. Jones explained that is all he had, but would order in another bottle.

Prescription Error: At approx. 1400 hours 7/12, the [redacted] returned to the store to complain that Mr. Jones had not given [redacted] enough of [redacted]. Mr. Jones stated that he should have given [redacted] enough, as [redacted] was only taking [redacted] and [redacted] stated that [redacted] was taking [redacted].

EXHIBIT 1

Page 1 of 1

04181016

and [REDACTED] The computer record was accessed by Mr. Jones, and the Sig. was to take [REDACTED]. After some discussion, the original Rx was located, and Mr. Jones acknowledged that he did not fill a sufficient quantity. The Rx Sig. was changed by Mr. Jones in the computer record, and additional medication was added to the old Rx bottle. Later, 7/13, Mr. Jones would complain that our presence was making him fill wrong prescriptions. When Mr. Jones was questioned as to whether the system had a tracking/audit trail for Rx Sigs that were changed, Mr. Jones kept stating that it did not make any difference, as he had just picked up the Rx 20 minutes ago, and it took a number of verbal transactions to determine that the system is capable of changing any Rx data, without any audit trail to track changes.

During approximately 4 hours of observing Mr. Jones process prescriptions, the QS-1 system in no case demonstrated an alert for allergy, therapeutic duplication, or disease-state interactions, or other warnings. Mr. Jones often reviewed the patient profile, as he used it to select the drug item he desired to refill, but in no cases except were asked went to the patients profile showing allergy and disease state information. Mr. Jones was asked several times to demonstrate an allergy or disease state interaction, but was always too "busy" to do so except for one occasion, when two [REDACTED] products were entered into the drug interaction program, and no alert occurred.

Since we had not been able to gather, and review all the data desired, due to missing files, we left Mr. Jones a list of items desired, and Mr. Jones stated that everything would be available on Tuesday morning and he inquired as to when we would return. Mr. Jones stated that he would be coming in early to find the missing files, and run the reports. We indicated that we would probably return at approximately 1000 hrs. Items requested were:

Computer printouts for all prescriptions between 12/23/98 and 7/10/99 for:

- Adderal 5mg
- Adderal 10mg
- Dexedrine 5mg tab
- Dexedrine 5mg cap
- Dexedrine 10mg cap
- Dexedrine 15mg cap

Missing C-II file for prescriptions numbered 2154500 through 2154599;

Missing prescription for [REDACTED] - [REDACTED] for [REDACTED]

Missing C-III through C-V controlled inventory

Phyllis Wene and I left the Pharmacy at approximately 1810 hrs to return to our respective offices.

7-13-99:

Returned to the Medicine Shoppe on 7/13/99 to complete the inspection and to review the documents that Mr. Jones stated that he would have ready and available for us to inspect. Arrived at the Shoppe at approximately 1100 hours and Mr. Jones was at first cordial and

EXHIBIT

Page 3 of 7

04151917

courteous. Mr. Jones stated he had not had time to find the documents and requested until Friday 7/16/99 to find and make them available. I stated that that would be ok, but that I had concerns that his system did not seem to be able to generate them. He was very emphatic that the reports would be available, only that he did not know how to generate them. He did try again to contact someone at the QS-1 office in an attempt to proceed with processing the reports.

Mr. Jones had also not found the missing C-II prescriptions, the other legend Rx's, or the C-III through C-V inventory that we had requested.

[redacted] came into the store, and while [redacted] was present, Mr. Jones stated several times that our behavior yesterday had been very intimidating, complaining that we are holding him to be guilty of something before the inspection, stating also that the Board of Pharmacy is taking bribes from the Rite Aid chain, and harassing him instead of dealing with Rite Aid. Mr. Jones threatened several times to take his complaints to the Don Williams and the Board, and that his technician (Shannon Boston) would substantiate his complaints. Mr. Jones stated that I was now to the role of inspections, and that I had yet a lot to learn, and that Mr. Jones would be yet teaching me how to deal with people. Mr. Jones also stated that he was the person that made the Board adopt the policy of providing Pharmacists with written comments back on the inspection, insinuating that he should not be challenged.

I was after some time able to review the inspection with Mr. Jones, after other customers were gone, gave Mr. Jones a written review of the inspection, and I later posted the unsatisfactory certificates on the wall.

EXHIBIT

04151918

Page 1 of 1

08/11/99 WED 10:00

07/18/99 14:15

APPLY STORE LABEL HERE OR FILL IN INFORMATION

The Medicine Shoppe Pharmacy  
9430 State Ave  
Marysville, WA 98270

**PHARMACY INSPECTION REPORT #5**  
DEPARTMENT OF HEALTH  
WASHINGTON STATE BOARD OF PHARMACY  
1300 QUINCE ST., S.E.; P. O. BOX 47883  
OLYMPIA, WASHINGTON 98504-7883  
TEL: 360/236-4825 FAX: 360/586-4359

INSPECTION PURPOSE  
 NEW  
 PERIODIC  
 OWNER CHANGE  
 LOCATION CHANGE  
 REINSPECTION  
 SELF

360 653-4520  
TELEPHONE NUMBER (Include Area Code)

Michael Jones  
RESPONSIBLE MANAGER

8-10-99  
INSPECTION DATE  
PH 10993  
LICENSURE NUMBER

LAST INSPECTED: 7-12-99

CLASSIFICATION: OWNERSHIP C P S PHARMACY TYPE:  C  H  P  L  M  O

**A. GENERAL REQUIREMENTS (10 POINTS)**

- 1.  PHARMACY INSPECTION CERT. POSTED (WAC 246-808-190)
  - 2.  PERSONNEL LICENSES POSTED (RCW 18.44.140)
  - 3.  PHARMACY LICENSES POSTED (RCW 18.44.043)
  - 4.  DEA REGISTRATION (WAC 246-807-020)
- LOCATION LICENSE NUMBER CE 55751  
REGISTRATION NUMBER BTSID0041

PHARMACISTS	LICENSE #	PRECEPTOR	INTERNS & TECHNICIANS	CERTIFICATE #	INTERN OR TECH
			<u>SHARON Boston 'Level B'</u>		
			<u>Krista Bolobanic 'Level A'</u>		

UP TO 3 POINTS SUBTRACTED FOR EACH DEFICIENCY (USE ADDITIONAL PAGE IF NECESSARY)

SECTION A TOTAL **10**

**B. PATIENT HEALTH & SAFETY REQUIREMENTS (30 POINTS)**

- 1.  PATIENT MED. RECORDS (WAC 246-870)
  - 2.  PATIENT INFORMATION (WAC 246-808-220)
  - 3.  DRUG PRODUCT SUBSTITUTION (GENERIC SIGN (RCW 66.41 & WAC 246-800))
  - 4.  CRC COMPLIANCE (WAC 246-800-230)
  - 5.  POISON REQUIREMENTS (WAC 246-808-200)
  - 6.  SPECIAL BYTEL POISON CONTROL & OUTDATED/DETERIORATED STOCK (WAC 246-800-100)
- NUMBER OF OUTDATED ITEMS  
60 TO 99 ITEMS = 30 POINTS  
10 TO 59 ITEMS = 25 POINTS  
1 TO 9 ITEMS = 15 POINTS  
24 PLUS ITEMS = 10 POINTS

UP TO 5 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION B TOTAL **10**

**C. PROFESSIONAL REQUIREMENTS (40 POINTS)**

- 1.  OSA ORDER FORMS (WAC 246-807-020)
- 2.  OSA INVENTORY RECORD (WAC 246-807-020)
- 3.  SCHEDULE V CR REGISTER (WAC 246-807-020)
- 4.  RESPONSIBLE RPH/MANAGER (WAC 246-800-070)
- 5.  LAWBOOK (WAC 246-808-100)
- 6.  REFERENCE SOURCE (WAC 246-808-100)
- 7.  PHARMACY ANCILLARY STAFF (WAC 246-800)
- 8.  PROFESSIONAL RESPONSIBILITIES (WAC 246-803-020)
- 9.  ALL DRUGS PROPERLY LABELED (WAC 246-808-020)
- 10.  COMPLETED PRESCRIPTION LABELS (WAC 246-808-210)
- 11.  PRESCRIPTION FILES (WAC 246-808-100)
- 12.  REGULATION COMPLIANCE (RCW 18.44.190 & 192)

UP TO 5 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION C TOTAL **16**

**D. FACILITIES (20 POINTS)**

- 1.  DIFFERENTIAL HOURS (WAC 246-800-020)
- 2.  RX AREA SECURE FROM PUBLIC (WAC 246-808-100)
- 3.  APPEARANCE OF STAFF (WAC 246-808-170)
- 4.  RX AREA WORKING SPACE (WAC 246-808-100)
- 5.  PRESCRIPTION AREA SIGN (WAC 246-808-100)
- 6.  REFRIGERATOR (WAC 246-808-100)
- 7.  TRASH RECEPTACLES (WAC 246-800-170)
- 8.  REST ROOMS (WAC 246-808-170)
- 9.  GENERAL CLEANLINESS & SANITATION (WAC 246-808-100, 102, 104, 106, 108)
- 10.  NECESSARY EQUIPMENT (WAC 246-808-100) FORSTNER #186592

UP TO 2 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION D TOTAL **20**

100 TO 80 POINTS = A

80 TO 60 POINTS = CONDITIONAL (WAC 246-803-110)

BELOW 60 POINTS = UNSATISFACTORY

COMMENTS:  YES  NO

GRADE TOTAL **56**

Michael Jones  
Signature of Pharmacist

Steve Johnson  
Signature of Investigator

DOH 880-020A (Rev. 8/99)

04131785



PHARMACY INSPECTION COMMENTS

THE MEDICINE SHOPPE PHARMACY  
Pharmacy Name Location License Number

COMMENTS

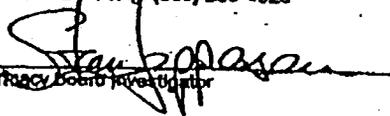
- C-1 DEA forms not complete. Receiving dates NOT completed. New filing system improves filing sequence & reduces loss.
- C-2 DEA inventory for C-II drug not signed. CII invoices filed with general invoice records and not <sup>filed separately</sup> ~~separately~~ <sup>reported</sup> ~~reported~~. FIRM DEA number is not on the C-II inventory or the CIII-X inventory.
- C-9 5 prescription bottles returned to prescription stock shelves, labeled with incorrect manufacturer.
- C-10 three prescriptions on wall call shelf labeled with wrong manufacturer.
- C-11 Numerous voids (holes) found in prescription files, with 21 noted <sup>missing</sup> in two consecutive days. Two prescriptions noted with a date of oo/oo/oo.
- C-12, Computer system does not have the ability to track change made to the prescription record. No tracking for audit purpose poss. b/c.

TELEPHONE INFORMATION LIST

Washington State Board of Pharmacy  
 Olympia Office - (360) 236-4826  
 Donald H. Williams, Executive Director  
 Joseph M. Honda, Operations Manager  
 Shannon Walker, Program Manager,  
 Facilities Licensing: (360) 236-4830  
 Susan Loutzenhiser, Program Manager,  
 Individual Licensing: (360) 236-4826

Washington State Pharmacists Association  
 Office - 1-800-222-WSPA (9772)

Washington Recovery Assistance Program  
 for Pharmacy (WRAPP): 1-800-448-7220  
 Ruth Kerachbaum, Monitoring Program  
 Manager

  
 Pharmacy Board Inspector

206-985-3715  
 Telephone

## Appendix C

**STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
BOARD OF PHARMACY**

In the Matter of the License to Practice Pharmacy of	)	Docket No. 99-08-A-1016PH
	)	
MICHAEL S. JONES, R.Ph.,	)	Docket No. 99-08-A-1017CF
License No. 10993,	)	
	)	EX PARTE ORDER OF SUMMARY
In the Matter of the Pharmacy Location	)	ACTION
License of	)	
	)	
The Medicine Shoppe Pharmacy,	)	
License No. 55751,	)	
	)	
Respondents.	)	
	)	

This matter came before the Board of Pharmacy (the Board) on August 17, 1999, on an Ex Parte Motion for Order of Summary Action brought by the Department of Health (the Department) by and through its attorneys, Christine O. Gregoire, Attorney General, and David M. Hankins, Assistant Attorney General. The Presiding Officer for the Board was Eric B. Schmidt, Senior Health Law Judge. The Board members deciding the Ex Parte Motion for Order of Summary Action were: Sharron Sellers, Public Member; Donna Docktor, R.Ph.; and C.A. Leon Alzola, R.Ph. The Board, having reviewed the motion and the documents submitted in support of the motion, hereby enters the following:

**Section 1: ALLEGATIONS**

1.1 Respondent Michael S. Jones was issued a license to practice pharmacy in the state of Washington in June 1980. Respondent's license to practice pharmacy in the state of Washington expires on October 29, 1999.

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1.2 Respondent Medicine Shoppe Pharmacy located at 9430 State Street in Marysville, Washington was issued a location license to operate as a Pharmacy in the state of Washington in October 1996. The current location license expires on June 1, 2000.

1.3 Respondent Michael Jones is the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.

1.4 On March 1, 1994, a Statement of Charges was issued against Respondent Michael Jones related to a prescription filling error while Respondent was working as a pharmacist at Safeway Pharmacy # 497 in Seattle, Washington

1.5 On July 6, 1994, the Board entered Findings of Fact, Conclusions of Law and Order placing Respondent's license to practice pharmacy in the state of Washington on probation for a period of one year and imposing certain terms and conditions. One of the conditions imposed on Respondent was a requirement that Respondent create and submit a plan to avoid violations of pharmacy law related to the filling of prescriptions.

1.6 On December 7, 1995, Respondent's license to practice pharmacy in the state of Washington was fully reinstated.

1.7 On December 17, 1998, Respondent Medicine Shoppe received a failing inspection grade of 79 from Board of Pharmacy Investigator Wene while conducting a routine inspection of the pharmacy. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The violations observed during the inspection may be seen in detail in the Statement of Charges and on the Inspection sheet and report attached as Exhibit 1 to the Ex Parte Motion for Summary Action.

1.8 An inspection score of 90-100 is classified as a passing pharmacy inspection score. An inspection score of 80-89 is classified as a conditional pharmacy inspection score. An inspection score of 0-79 is classified as an unsatisfactory (failing) inspection score.

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1.9 On February 3, 1999, Board of Pharmacy Investigator Wene conducted a re-inspection in relation to the December 1998 failing score. During the February 3, 1999 inspection, the pharmacy received a passing score of 94. The deducted points were related to inaccurate, incomplete or missing records required by state or federal law. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The report of this inspection is attached as Exhibit 2 to the Ex Parte Motion for Summary Action.

1.10 On July 12, 1999, Board of Pharmacy Investigators Wene and Jeppesen conducted a routine inspection of the Medicine Shoppe Pharmacy in Marysville. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The pharmacy received an unsatisfactory extremely low failing grade of 48. The violations observed during the inspection may be seen in detail in the Statement of Charges and on the Inspection sheet and report attached as Exhibit 3 to the Ex Parte Motion for Summary Action.

1.11 On July 13, 1999, Investigator Jeppesen returned to the pharmacy to retrieve documents promised by Respondent Jones. At that time Respondent Jones stated he could not locate the documents. Respondent stated that his computer could generate the required reports but that he, Respondent, did not know how to generate them. Investigator Jeppesen's report of this matter is attached as Exhibit 4 to the Ex Parte Motion for Summary Action.

1.12 On August 10, 1999, Investigators Wene and Jeppesen returned to the Medicine Shop Pharmacy in Marysville, Washington, to conduct the re-inspection in relation to the July 12, 1999 unsatisfactory (failing) score. This inspection again resulted in an extremely low failing score of 56. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The violations observed during the

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inspection may be seen in detail in the Statement of Charges and on the Inspection sheet and report attached as Exhibit 5 to the Ex Parte Motion for Summary Action.

1.13 Respondent Michael S. Jones operated the Medicine Shoppe Pharmacy in a manner below the standard of care for the operation of a pharmacy in the state of Washington and therefore placed the patients of his pharmacy at serious risk of significant harm.

1.14 Due to the condition of the pharmacy, especially the violations related to record-keeping, summary suspension of both Respondent Jones and the Medicine Shoppe Pharmacy is the least restrictive means of protecting the pharmacy. The pharmacy is not in an operable condition to allow another pharmacist to operate the Pharmacy in Respondent Jones' absence.

#### Section 2: FINDINGS OF FACT

2.1 Respondent Jones was licensed as a pharmacist by the State of Washington at all times applicable to this matter.

2.2 Respondent Medicine Shoppe Pharmacy was licensed as a pharmacy by the State of Washington at all times applicable to this matter.

2.3 The Board issued a Statement of Charges alleging Respondents violated RCW 18.64.160(5), RCW 18.64.165(2), RCW 18.64.245, RCW 18.64.246, RCW 18.64.270, RCW 18.130.180(4), (6), (7), RCW 69.04.450, RCW 69.05.510, RCW 69.41.042, RCW 69.41.050, RCW 69.50.306, WAC 246-863-095, WAC 246-863-110, WAC 246-869-130, WAC 246-869-150, WAC 246-869-160(4) and (5), WAC 246-869-190, WAC 246-869-210, WAC 246-869-230, WAC 246-875-020, WAC 246-875-040, WAC 246-875-080(2), WAC 246-901-090 and WAC 246-901-100(3). The Statement of Charges was accompanied by all other documents required by WAC 246-11-250.

2.4 The Board finds that the public health, safety and welfare imperatively require emergency action pending further proceedings due to the nature of the allegations as stated above and in the Statement of Charges.

2.5 The alleged conduct, as set forth in the Allegations above and as supported by the documents attached to the Ex Parte Motion for Order of Summary Action, is directly related to Respondent Jones's ability to practice as a pharmacist, and Respondent Medicine Shoppe Pharmacy's ability to operate as a pharmacy, in the state of Washington. The Board finds, based on the declarations and evidence submitted with the Ex Parte Motion for Order of Summary Action, that summary suspension of Respondent Jones's license to practice as a pharmacist and of Respondent Medicine Shoppe Pharmacy's license to operate as a pharmacy are the least restrictive actions necessary to prevent or avoid immediate danger to the public health, safety, or welfare.

### Section 3: CONCLUSIONS OF LAW

3.1 The Board has jurisdiction over Respondent Jones's license to practice as a pharmacist in the state of Washington.

3.2 The Board has jurisdiction over Respondent Medicine Shoppe Pharmacy's license to operate as a pharmacy in the state of Washington.

3.3 The Board has authority to take emergency adjudicative action to address an immediate danger to the public health, safety, or welfare. RCW 34.05.422(4), RCW 34.05.479, RCW 18.130.050(7); and WAC 246-11-300.

3.4 The above Findings of Fact and Allegations establish:

(a) The existence of an immediate danger to the public health, safety, or welfare;

(b) That the requested summary action adequately addresses the danger to the public health, safety, or welfare; and

(c) The requested summary action is necessary to address the danger to the public health, safety, or welfare.

3.5 The requested summary action is the least restrictive agency action justified by the danger posed by Respondent Jones's continued practice as a pharmacist and by Respondent Medicine Shoppe Pharmacy's continued operation as a pharmacy in the state of Washington.

3.6 The above Findings of Fact and Allegations establish conduct which warrants summary action to protect the public health, safety, or welfare.

**Section 4: ORDERS**

Based on the above Findings of Fact, Allegations and Conclusions of Law, the Board enters the following orders:

4.1 IT IS HEREBY ORDERED that the license issued to Respondent Michael S. Jones, R.Ph., to practice as a pharmacist in the state of Washington is **SUMMARILY SUSPENDED** pending further disciplinary proceedings by the Board.

4.2 IT IS HEREBY ORDERED that the license issued to Respondent Medicine Shoppe Pharmacy, located at 9430 State Street in Marysville, Washington, to operate as a pharmacy in the state of Washington is **SUMMARILY SUSPENDED** pending further disciplinary proceedings by the Board.

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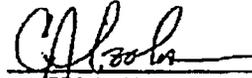
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43 Respondents shall immediately surrender both portions of their licenses to practice to a representative from the Board of Pharmacy upon demand.

DATED THIS 17<sup>th</sup> DAY OF AUGUST, 1999.

STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
BOARD OF PHARMACY

  
C.A. LEON ALZOLA, R.Ph.  
Panel Chair

FOR INTERNAL USE ONLY. INTERNAL TRACKING NUMBER:  
99910003, 99010013  
CRS No. 99-03-14-0750

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## **Appendix D**

STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
BOARD OF PHARMACY

In the Matter of the License to Practice Pharmacy of )  
MICHAEL S. JONES, R.Ph., )  
License No. 10993, )  
In the Matter of the Pharmacy Location License of )  
The Medicine Shoppe Pharmacy, )  
License No. 55751, )  
Respondents. )

Docket No. 99-08-A-1016PH  
Docket No. 99-08-A-1017CF  
DECLARATION OF  
MICHAEL S. JONES

I, Michael S. Jones, R.Ph., do hereby declare as follows:

I am the Respondent herein and make this Declaration regarding facts and information about which I have personal knowledge and information.

I want to preface this statement by saying that I sincerely regret the fact that my pharmacy was considered to be below the accepted minimum standard for pharmacies in Washington when it was last inspected on August 10, 1999. Since that time, I have spent a great deal of time addressing the concerns of the investigators. I believe that the following discussion, which addresses each of the concerns raised in the Statement of Charges (S.O.C.) as well as by the inspectors, will show that all of the concerns had simple explanations, were not violations, and/or were quickly and easily rectified. I am truly sorry that the following matters had not been completely taken care of by August 10, 1999, so as to alleviate the concerns of the investigators:

DECLARATION OF MICHAEL S. JONES

Page 1

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04132215

1 I. Although information regarding allergies and chronic conditions has always  
2 been obtained from all patients, there was a question as to whether it was being properly  
3 inputted into the computer. Further, the disease state-drug interaction fields were thought  
4 (by the inspectors) to have been turned off. Therefore, while the inspectors were at lunch on  
5 August 10<sup>th</sup>, I contacted my computer vender to discuss these problems. I was informed,  
6 much to my surprise, that these features were left off by the company (i.e., never turned on  
7 by them), unless they were specifically requested to do so. I had no idea that these features  
8 were not functioning and told them to activate them immediately, which they did. This  
9 explained why I could not explain their functioning to the inspectors and why they thought I  
10 had turned it off, which I had not done. Nevertheless, this function was operational by the  
11 time they returned from lunch. I even showed this to Mrs. Wene, so I am at a loss to  
12 understand why this is included in the S.O.C., especially when I was not marked down for  
13 this on the Inspection Report. Lastly, all patients have been updated regarding chronic  
14 conditions and allergy information. If there is no such information in the computer for a  
15 patient, that is because the patient has no allergies or chronic conditions.

18 2. Many of the prescriptions that were randomly selected and described as  
19 having products in them that did not match the NDC numbers were ones that were still there  
20 from the prior inspection and had not been picked up by the customers by the time of the  
21 August 10<sup>th</sup> inspection. Consequently, I was cited for them twice (double jeopardy) even  
22 though they were not new infractions. I should not have lost points a second time for the  
23 same prescriptions.  
24

25 Nevertheless, I had already instituted a new system prior to the last inspection to  
26 make sure that the NDC numbers matched the product, and the necessary changes were  
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DECLARATION OF MICHAEL S. JONES

Page 2

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04132216

1 being made, and have been made, in the computer. Henceforth, there will be no variance.  
2 However, at the time of the August 10<sup>th</sup> inspection, I had not had time to make all the  
3 necessary changes. This is an ongoing process and does not take place overnight. We now  
4 use checkmarks to double check and make sure the product matches the NDC. If it doesn't,  
5 the NDC is changed. I do not expect to have any further problems in this regard.

6  
7 3. With respect to the CRC/NCRC issue, this has already been explained. It is a  
8 fact that at least 95 percent of my customers have specifically requested that I use NCRC  
9 lids on their containers and I have signatures for every one of them! There is no rule or  
10 regulation that mandates a maximum percentage of NCRC's that can be used. Anyone can  
11 request NCRC containers and it is not limited to the elderly. The only qualification is that  
12 they sign a record indicating this request and I did that with all my customers. While my  
13 records may not have been organized for ease of reference, it was wrong to single me out  
14 simply because the percentage of NCRC's is high. It was also my understanding that Mrs.  
15 Wene approved of my system when I received a 94 on February 3, 1999. That was the same  
16 system that was in place in July and August.

17  
18 Nevertheless, as a result of the difficulties that this has caused me, I have already  
19 changed my system for recording these signatures. They will now be filed alphabetically on  
20 index cards so that they can be easily retrieved, in addition to this request being indicated in  
21 the computer. Everyone, including those who have already signed my signature book, will  
22 sign my new index cards. Further, everyone working in the pharmacy will be vigilant to  
23 make sure that no NCRC's are used without the necessary signatures. Further, no  
24 prescription will be dispensed without a CRC unless the receipt says "NRC".  
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1 4. All outdated legend and OTC products have been removed from my shelves.  
2 In order to avoid any problems with this in the future, we will now do a monthly review  
3 instead of quarterly, for outdates. This will ensure that no outdates remain on the shelves. I  
4 also had "Returns by Howard" come out, inspect for outdates, too, and process our returns.

5 5. With regard to the "inaccurate, incomplete or unavailable" records, I have  
6 already rectified these concerns. Signatures have been provided, where needed, on  
7 controlled substance inventories. CII invoices have been separated from all other invoices  
8 and will continue to be filed separately. They are also being stapled to DEA 222 forms per  
9 the Inspector's recommendation.

11 I also had an employee spend a week going through all of our prescription files to  
12 make sure they were in proper order and otherwise in compliance. The records and  
13 prescription hard copies that could not be located at the time of the inspection have since  
14 been located. They had simply been misfiled. We will, hereafter, be cognizant of this  
15 problem and vigilant to make sure that this doesn't happen. One plan for avoiding this  
16 problem is to organize these records and files on as nearly a daily basis as possible.

18 One of the primary reasons I had a problem with missing information at the last  
19 inspection was because of a lack of knowledge and information as to exactly what was  
20 expected or required. I would be told at one inspection that e.g. I was missing signatures.  
21 Having been made aware of this, I complied. However, nothing else was pointed out as  
22 being deficient. Then, at the next inspection, something else, e.g., DEA numbers, would be  
23 pointed out. If I had simply been advised, all at one time, what I needed to do, I would not  
24 have had a problem with these requirements on a piecemeal basis. However, I think I now  
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04132218

1 know what is required and I can assure you that my records will be in full compliance  
2 hereafter.

3 6. All records, invoices, etc. that were of concern to the inspectors have been  
4 located, organized, and separated per their instructions and recommendations.

5 7. There were three DEA 222 forms that were in question at the time of the  
6 inspection regarding the quantities and dates. With one, the order had not yet been received  
7 at the pharmacy. Another blank had been lost between my pharmacy and the wholesaler. I  
8 verified this with them, and the fact that the order had not been received or filled by them.  
9 With respect to the third form, the order had not been checked in yet. I subsequently  
10 checked the quantity and dated the form. We now staple the CII invoice to the blue 222  
11 form. We had never been advised, or instructed, to do this before, but we are doing it now.  
12

13 8. Lastly, the inspectors were concerned that our QS-I system was inadequate  
14 for the minimum procedures for utilization of the patient medication system and for creating  
15 an accurate and complete audit trail for changes made to the prescriptions after filling.  
16 These concerns were unfounded. I have spoken with the QS-I technical support personnel,  
17 the system is fully capable of performing these functions, and I am able to utilize these  
18 functions. The process is too lengthy to describe, but I would gladly show an inspector how  
19 it is done.  
20

21 I believe the foregoing fully and completely addresses all matters and concerns  
22 raised by the inspectors and alleged in the S.O.C. that have affected the licenses of myself  
23 and my pharmacy. I feel very strongly about the fact that none of these concerns have ever  
24 had even the potential for adversely affecting the health, safety or welfare of any of my  
25 customers. The health, safety and welfare of my customers has always been of paramount  
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DECLARATION OF MICHAEL S. JONES

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04132219

1 importance and I would never do anything to compromise this, nor have I. I take great pride  
2 in my professionalism and will continue to do so.

3 I do not believe that the summary suspensions of both mine and my pharmacy's  
4 licenses were necessary or justified. The action of the Board has very likely ruined me,  
5 financially, and it is doubtful that I will ever be able to recover. At the very least, I will  
6 never recoup my substantial losses. The Board has also caused me to suffer, unnecessarily,  
7 a great deal of personal humiliation and trauma.

8  
9 I have done everything possible to bring my pharmacy into compliance and to satisfy  
10 the concerns of the Board. Further, I steadfastly resolve to maintain this compliance and to  
11 maintain my pharmacy's rating at the highest level.

12 I have been punished, and made an example of, long enough. Nothing more can  
13 possibly be gained by continuing the Board's course of action. I have been penalized in  
14 virtually every possible way. The punishment should fit the "crime", not exceed it, as it has  
15 in my case. It is time to stop the bleeding.

16  
17 I respectfully request that the summary suspensions of my license and Medicine  
18 Shoppe's license be stayed immediately so that I can attempt to pull my business and my  
19 livelihood out of the ashes. In addition to the preservation of one of a dying breed of  
20 community pharmacies, it is imperative to open the pharmacy immediately so that I can  
21 service the medical needs of my customers. They, too, have been seriously affected by the  
22 board's action which has been counterproductive to the stated goal of "protecting" them.

23  
24 There is absolutely no need, or justification, for preventing me from returning to my  
25 pharmacy immediately as the responsible pharmacist pending the resolution of any other  
26 matters with the Board, if any. I am the only one who knows the QS-I system and I am  
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DECLARATION OF MICHAEL S. JONES

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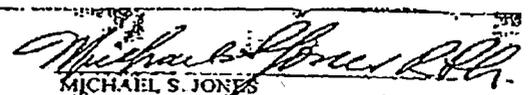
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perfectly capable, and competent, of continuing to operate my pharmacy in a very professional manner, and of continuing to provide my customers with the excellent care they have come to expect from me and my staff. Once again, I ask that, before I am ruined completely, the licenses be reinstated and my pharmacy reopened immediately.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my information, knowledge and belief.

EXECUTED this 27<sup>th</sup> day of August, 1999, at Bothell, Washington.

  
MICHAEL S. JONES

04132221

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STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
BOARD OF PHARMACY

FILED  
AUG 30 1999  
Adjudicative Clerk  
Office

In the Matter of the License to Practice Pharmacy of	)	Docket No. 99-08-A-1016PH
	)	
MICHAEL S. JONES, R.Ph., License No. 10993,	)	Docket No. 99-08-A-1017CF
	)	
In the Matter of the Pharmacy Location License of	)	DECLARATION OF W. BERNARD BAUMAN IN SUPPORT OF
	)	RESPONDENTS' MOTION TO
The Medicine Shoppe Pharmacy, License No. 55751,	)	MODIFY AND TO STAY SUMMARY
	)	SUSPENSIONS
	)	
Respondents.	)	

I, W. Bernard Bauman, do hereby declare as follows:

I am the attorney for the Respondents herein and make this Declaration regarding facts and information about which I have personal knowledge.

I have reviewed the Declaration of Michael S. Jones and confirm and agree with the statements made therein. Mr. Jones is quite accurate in his position that the Board's action has very nearly, if not completely, ruined him financially. The continued viability of his pharmacy after this lengthy closure is in serious jeopardy and the only possibility of resurrecting it and reversing the irreparable harm being caused by the Board's closure is to reinstate both licenses and re-open the pharmacy under the control of Mr. Jones no later than Tuesday, August 31, 1999.

It should be clear from Mr. Jones' Declaration that the only thing he is really "guilty" of is disorganization and this does not constitute unprofessional conduct nor does it

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04132210

1 represent any threat to the health, safety and welfare of his customers. To summarize the  
2 concerns of the Board and Mr. Jones' responses:

3 1. Medical Information. Mr. Jones has always obtained allergy and medical  
4 condition information from his patients and, when available, inputted it into his computer.  
5 His QS-1 computer has the capability of recognizing and alerting the user to drug interaction  
6 and disease date information and Mr. Jones logically assumed this feature was operating.  
7 However, QS-1 had not activated it and, when he learned this, he had them do it  
8 immediately. Obviously, this was not his fault, he has corrected the problem, and he has  
9 also gone over his patient files and updated this information.

11 2. NDC Numbers. Mr. Jones was already in the process of correcting this  
12 problem when the inspectors returned on August 10, 1999. However, he was penalized a  
13 second time for the same prescriptions because they had not been picked up by the  
14 customers. Since the August 10<sup>th</sup> inspection, Mr. Jones has instituted a new system that is  
15 designed to make sure that, henceforth, all products dispensed match the NDC numbers in  
16 the computer. Nevertheless, this type of infraction does not jeopardize the safety of his  
17 customers.

19 3. CRC/Non-CRC. Mr. Jones has, at all times, been in complete compliance  
20 with regard to the caps used on his prescription bottles. The worst thing that can be said is  
21 that his record-keeping system for the signatures did not allow for one to readily verify  
22 specific signatures. However, this was not pointed out to him as a problem during his  
23 inspection in February 1999! Further, the high percentage of non-CRC caps used is not a  
24 violation of any regulation. Nevertheless, in order to avoid any further questions in this  
25 regard, Mr. Jones has voluntarily changed his system as he has described. This was,  
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DECLARATION OF W. BERNARD BAUMAN Page 2

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04132211

1 apparently, a big concern of the inspectors but this, too, did not present a safety concern to  
2 "the public".

3 4. Outdates. In light of the fact that a few products slipped through the cracks,  
4 Mr. Jones has changed his procedure for discovering and removing outdated products.  
5 Nevertheless, the few items that were missed and inadvertently not pulled did not pose a  
6 health risk to "the public".

7 5. Records and Files. These issues were fully addressed by Mr. Jones in his  
8 Declaration, the situation has been corrected and it will not happen again due to the  
9 institution of new record-keeping procedures. Here, again, the record-keeping problems,  
10 posed absolutely no risk to "the public".

11 6. QS-I Computer Functions. As stated in Mr. Jones' Declaration, his computer  
12 system is capable of performing all the functions that are necessary and required for any  
13 pharmacy to adequately monitor the medical and pharmaceutical information for their  
14 patients, including, but not limited to, drug interactions and audit trails.

15 It should be abundantly clear to all concerned that Mr. Jones is a capable and  
16 concerned Pharmacist. He has, at all times, provided professional care to his customers and  
17 has done nothing to jeopardize the health, safety, and welfare of "the public". The foregoing  
18 discussion makes this very clear. None of the Board's concerns, alone or even in  
19 combination, rise to the level of concern professed by the inspectors and the Board. This  
20 matter could, and should, have been handled in a much more constructive, pharmacist-  
21 friendly and customer-friendly manner, regardless of the results of his last two inspections.  
22 It is presumably the function of the Board to not only protect the public but to also assist  
23 pharmacists throughout the state to improve the level of their practice.  
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DECLARATION OF W. BERNARD BAUMAN Page J

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041322.12

1 It should not be the purpose of the Board to hinder and intimidate pharmacists in  
2 their practice, or to plunge ahead with sanctions without giving any thought to the  
3 seriousness of the consequences and ramifications of their actions. These are precisely the  
4 things that have occurred in this case. Instead of assisting Mr. Jones to improve the level of  
5 his practice, the inspectors descended on him with the intention of finding fault, intimidating  
6 him and disrupting his business. Their noticeable presence throughout the entire day was  
7 disruptive and intimidating, especially when an inspector stood directly behind him, looking  
8 over his shoulder, for an entire day. His intent was obvious and this type of conduct is  
9 completely inappropriate. Further, instead of trying to determine the truth as to what  
10 violations/infractions really occurred, by discussing their concerns and giving him the time  
11 and opportunity necessary to show that, for the most part, the real problem was simply  
12 disorganization, they treated him like a criminal instead of a fellow professional.

13  
14 This attitude and approach led directly to the ex-parte summary suspensions for  
15 which there was absolutely no justification, not even under the circumstances described by  
16 the Board. The Board's action was clearly excessive and unwarranted and served to destroy  
17 a pharmacist and the business he has worked so hard to build. The Board has destroyed  
18 years of hard work overnight! There is no rational reason or justification for sending a man  
19 into bankruptcy for the violations discussed herein!

20  
21 The time has come to lift the suspensions of both licenses, put an end to the financial  
22 and emotional damage that he is suffering, and allow him to try and salvage what is left of  
23 his business. He deserves this consideration. He does not deserve the damage the Board has  
24 caused him. And he has faithful customers standing behind him, waiting for him to re-open.  
25 They deserve to have their needs met, too, and the Board should be concerned about that.  
26  
27  
28

DECLARATION OF W. BERNARD BAUMAN Page 4

W. BERNARD BAUMAN  
ATTORNEY AT LAW  
SUITE 401 PIONEER BUILDING  
ONE PIONEER SQUARE  
SEATTLE, WASHINGTON 98104  
(206) 464-1860

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Mr. Jones is prepared to have the inspectors come out immediately so that his pharmacy can receive their approval. He must open his doors for business within the next 48 hours or the damage will be irreversible, if it isn't already. We request, and look forward to, the immediate consideration of this Motion and an immediate stay of the suspensions.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my information, knowledge and belief.

EXECUTED this 27<sup>th</sup> day of August, 1999, at Seattle, Washington.

  
W. BERNARD BAUMAN, WSBA #8849  
Attorney for Respondents

## Appendix E

The Board signed and entered the stipulated order on February 4, 2000.  
CP at 430.

**B. Summary of Facts Relating to the July and August 1999 Inspections, and Mr. Jones' Admissions to Health and Safety Violations in Declarations Submitted to the Pharmacy Board**

As stated above, Mr. Jones and the attorney representing him in the disciplinary proceedings each filed declarations in an effort to persuade the Pharmacy Board to lift the summary suspensions. CP at 339-52. In these declarations, Mr. Jones admitted to or acknowledged many of the violations enumerated in the investigators' inspection reports, but represented to the Board that the problems had been rectified. The following discussion summarizes some of the investigators' findings at the July and August 1999 inspections, as documented in the reports of the inspections, explains the legal source of these violations<sup>9</sup>, and refers the court to where Mr. Jones admitted to the violations.

**1. Patient Medical Records: Adverse Reactions and Drug Interactions**

WAC 246-875-001 requires that a pharmacist maintain either a manual or an automated patient medical records system. WAC 246-875-020 provides that an automated patient medical record system must record

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<sup>9</sup> Federal statutes and regulations pertaining to pharmacists that are discussed in this section are attached as Appendix E. Provisions of Washington statutes pertaining to the Pharmacy Board that are discussed are attached as Appendix F. Provisions from the Washington Administrative Code relating to the regulation of pharmacists and pharmacies discussed in this section are attached as Appendix G.

“any patient allergies, idiosyncrasies, or chronic condition which may relate to drug utilization.” WAC 246-875-020. In addition WAC 246-875-040 requires that such a system “determine the possibility of a clinically significant drug interaction, reaction, or therapeutic duplication...”

Mr. Jones utilized an automated computer patient medical records system known as QS-1. Inspector Jeppesen indicated in his report of the July 1999 inspection, “During approximately 4 hours of observing Mr. Jones process prescriptions, the QS-1 system in no case demonstrated an alert for allergy, therapeutic duplication, or disease state interactions or other warnings.” CP at 284. He indicated in his report of the August 1999 inspection that there were “six patients noted in computer system with no allergy information. 2 of 5 patients without disease state data. Drug-disease state interaction module has been turned off. Pharmacist without knowledge of meaning of drug-drug interaction levels or how to find definitions or meanings. Pt. profile do [sic] not reflect what the patient actually received....” CP at 288.

Mr. Jones later admitted in a declaration he submitted to the Pharmacy Board that the disease state-drug interaction fields of this computer system were indeed not turned on until the investigators brought the issue to his attention during the second inspection in August 1999, at

which point he contacted his computer system's vendor, whom he blamed for this error, to have this feature turned on. CP at 341. Without this system functioning, as it is undisputed that it was not, Mr. Jones would be unable to detect potentially fatal allergic reactions of his patients. CP at 274.

## **2. Patient Medical Records: Audit Trail**

Patient medical records systems, such as the QS-1 system used by Mr. Jones, are required to provide an "audit trail," meaning all materials and documents required for the entire process of filling a prescription, which must be sufficient to document or reconstruct the origin of the prescription order and authorization of subsequent modifications of the order. WAC 246-875-001; WAC 246-875-010. The purpose of this requirement is to provide the pharmacist a means to retrieve all new prescription and refill prescription information relevant to patients, to provide safeguards against improper manipulation or alteration of records, and to ensure that health and welfare of patients. *Id.* With respect to a computerized or automated system, such as Mr. Jones', WAC 246-875-040 requires that the system document any changes to a prescription order, such as drug name, dose, route, dose form or directions for use, in the audit trail.

In his report of the July 1999 inspection, Inspector Jeppesen stated that when Mr. Jones was asked about his computer system, "it took a number of verbal transactions to determine that the system is capable to [sic] changing any Rx data, without any audit trail to track changes." CP at 284. Later, Inspector Jeppesen indicated in his August 1999 inspection report that Mr. Jones' computer system did "not have the ability to track changes made to the prescription record. No tracking for audit purposes possible." CP at 289.

Mr. Jones later testified in a declaration in August 1999 that the investigators had been "concerned that our QS-1 system was inadequate for the minimum procedures for utilization of the patient medication system and for creating an accurate and complete audit trail for changes made to the prescriptions after filling." CP at 344. Only after the August 1999 inspection did Mr. Jones indicate that he had spoken with the QS-1 technical support personnel to confirm that the system was capable of performing these functions and familiarize himself with how to use them. CP at 344.

### **3. Child Resistant Caps**

WAC 246-869-230 requires that all legend drugs be dispensed in a child resistant container (CRC), unless an authorization is received by the pharmacist from the patient, the patient's representative, or the

prescribed.<sup>10</sup> Investigator Jeppesen indicated in his report that Mr. Jones could not locate patient authorizations for many customers to whom he was dispensing drugs in non-CRC's: "the blue three ring binder where [Mr. Jones] had patients sign for authorization to have non safety caps dispensed...is divided into alphabetic sections, with several to many pages of signatures listed down each page, on both sides. Many signatures are difficult to impossible to read, and are not in alphabetic order within the section." CP at 283. Mr. Jeppesen's report indicated that when Mr. Jones was requested to locate authorizations for seven patients, all of whose last name started with the letter "B," Mr. Jones could locate only two of the seven required authorizations in his records. CP at 283. At the August 1999 inspection, Mr. Jeppesen's report indicated that there were 41 prescriptions on Mr. Jones' will-call shelf, only one of which was a child-resistant container.<sup>11</sup> CP at 288. Only one authorization for a non child-resistant container for these prescriptions could be located. CP at 288. Mr. Jones later confirmed in a declaration that his patient authorizations "may not have been organized for ease of reference," and Mr. Jones'

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<sup>10</sup> This requirement is consistent with the federal Poison Prevention Packaging Act and its accompanying regulations, which generally require that controlled substances and prescription drugs be dispensed in child-resistant packaging. 15 USC § 1471-1476; 16 CFR § 1700.5. See App. E.

<sup>11</sup> As the Statement of Charges reflects, the one prescription container that did have a child-resistant cap was in a container that had been supplied by the drug manufacturer. CP 302.

attorney verified that Mr. Jones' "record-keeping system did not allow for one to readily verify specific signatures." CP at 342, 349.

#### **4. Outdated/Deteriorated Stock**

The federal Food and Drug Administration requires that drugs be assigned expiration dates based on testing that is designed to assess drug stability. 21 USC § 321; 21 CFR § 211.137; 21 CFR § 211.166. Investigator Jeppesen's report regarding his July 1999 inspection of Mr. Jones' pharmacy indicates that 38 items found in Mr. Jones' prescription stock area were outdated. CP at 280. Investigator Jeppesen's report regarding his August 1999 re-inspection of the pharmacy indicated that eleven items were found on Mr. Jones' shelves and in his refrigerator that were outdated. CP at 288. When Mr. Jones moved to stay the Board's summary suspension order, he admitted to having outdated prescriptions on his shelves, representing to the Board that he subsequently removed these items. CP at 343. Mr. Jones' attorney verified that that some of these outdated items had "slipped through the cracks." CP at 350.

#### **5. Record-Keeping Deficiencies Regarding Prescription Inventory Records**

Pharmacists are required to keep detailed records of all quantities of controlled substances purchased and sold, and they must perform an inventory of each substance every two years. 21 USC § 827. The

inventory must contain a complete and accurate record of all controlled substances on hand on the date the inventory is taken and must be maintained at the registered location. 21 CFR § 1304.11 (a). There are both civil and criminal penalties for failure to keep these required records. 21 USC § 842. WAC 246-887-020 implements these requirements in Washington and provides the pharmacists in this state are subject to all of the above requirements.

Investigator Jeppesen indicated in his report regarding the July 1999 inspection that Mr. Jones' inventory records were not complete, and that he could not locate all of the requested inventory records even after being allowed an extra day. CP at 284-85. Mr. Jeppesen's August 1999 inspection report indicated that Mr. Jones had "numerous voids (holes) found in prescription files, with 21 noted missing in two consecutive days." CP at 289.

In his declaration submitted to the Pharmacy Board, Mr. Jones himself admitted that he was missing prescription records at the time of the August 1999 inspection, acknowledging that he "had an employee spend a week going through all of our prescription files to make sure they were in proper order and otherwise in compliance," and explaining that certain prescription records could not be located at the time of the inspection, because "[t]hey had simply been misfiled." CP at 343-44. In

his more recent declaration submitted in response to the State's summary judgment motion, Mr. Jones further admitted that there were additional "missing prescriptions" that he could not locate. CP at 214-15. He placed the blame for these missing prescription records on a former employee whom he contends, without any evidence, stole them. CP at 214-15.

**6. Record-keeping Deficiencies Regarding Schedule II Drug DEA Forms**

Special record-keeping requirements are imposed with respect to Schedule II drugs. The U.S. Attorney General has made a determination that Schedule II drugs have a high potential for abuse which may lead to severe psychological or physical dependence. 21 USC § 812 (b)(2). Examples of Schedule II drugs include morphine, phencyclidine (PCP), cocaine, methadone, and methamphetamine. 21 CFR § 1308.12. Schedule II inventory records must be kept separately from all other records. 21 USC 827 (b). In addition, DEA order forms (DEA Form 222) for Schedule II drugs must be prepared and executed by any pharmacist who dispenses these drugs, and the pharmacist must maintain these forms for a period of at least two years. 21 CFR § 1305.06; 21 CFR 1305.13. These DEA order forms are "required to be used for all orders of Schedule II controlled substances and to record the amount of drugs actually received by the purchaser and the date of their receipt." *United*

*States v. Poulin*, 926 F. Supp. 246, 249 (D. Mass 1996).

WAC 246-887-020 implements the above requirements in Washington.

During the July 1999 inspection, Mr. Jeppesen's report indicated that Mr. Jones was not able to locate Schedule II prescription records. CP at 280, 284-85. He further indicated that even after the investigators allowed Mr. Jones an additional day, he still had not located them. CP at 285. Investigator Jeppesen's report regarding the August 1999 inspection indicates that, once again, Mr. Jones' DEA forms were not complete, that the Schedule II inventory was not signed, that the Schedule II invoices were filed with general invoice records and not filed separately, and that the firm DEA number was not on the Schedule II inventory. CP at 287-89. In a declaration submitted to the Pharmacy Board, Mr. Jones admitted several of these DEA forms were incomplete, or else missing altogether. CP at 344. Again, he offered excuses ranging from one of the forms being lost to one of them not being "checked in yet." CP at 344.

**C. Procedural History of This Lawsuit**

Mr. Jones filed two identical complaints in the Snohomish County Superior Court, alleging a claim under 42 USC § 1983 for denial of procedural due process, as well as claims for negligence, recklessness, intentional interference with a business expectancy, and injunctive relief. CP at 470-77, 505-12. The trial court consolidated these identical

## **Appendix F**

STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
BOARD OF PHARMACY

In the Matter of the License to Practice ) as a Pharmacist of: )	Docket No. 99-08-A-1016PH
MICHAEL S. JONES, R.Ph., ) License No. 10993, )	Docket No. 99-08-A-1017CF
In the Matter of Pharmacy Location ) License of: )	ORDER ON MOTION TO MODIFY
The Medicine Shoppe Pharmacy, ) License No. 55751 )	EX PARTE ORDER OF SUMMARY
Respondents. )	ACTION

This matter came before Health Law Judge Arthur E. DeBusschere, Presiding Officer for the Board of Pharmacy (the Board), on a Motion to Modify Ex Parte Order of Summary Action, brought by the Respondent, Michael S. Jones, R.Ph., by and through his counsel, W. Bernard Bauman, Attorney at Law. Lori Lebon Salo, Assistant Attorney General, represents the Department of Health (the Department). The Board members deciding this motion were Sharron Sellers, Public Member; Donna Docktor, R.Ph.; and C.A. Leon Alzola, R.Ph., Panel Chair.

The Board having reviewed the motion and the documents submitted in support of this motion, hereby enters the following:

I. PROCEDURAL HISTORY

1.1 On August 17, 1999, the following documents were served upon the Respondent: (1) Statement of Charges; (2) Notice and Opportunity for Prompt Hearing, Regularly Scheduled Hearing or Settlement; (3) Answer to Statement of Charges and

ORDER ON MOTION TO MODIFY  
EX PARTE ORDER OF SUMMARY ACTION - Page 1

**ORIGINAL**

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Request for Prompt Hearing or Settlement and Regularly Scheduled Hearing; and (4) Ex Parte Order of Summary Action. In the Ex Parte Order of Summary Action, the Board ordered that the Respondent's license to practice as a pharmacist in the state of Washington be summarily suspended. The Board also ordered that the license issued to Respondent Medicine Shoppe Pharmacy, located at 9430 State Street in Marysville, Washington, to operate as a pharmacy be summarily suspended.

1.2 On August 17, 1999, the Respondent filed an Answer to Statement of Charges. In his Answer, the Respondent indicated that he would file a motion to contest the summary action.

1.3 On August 30, 1999, the Respondent filed a Motion to Modify Ex Parte Order of Summary Action and a Declaration of Bernard Bauman in Support of his Motion. Also filed was a Declaration of Michael Jones, R.Ph.

1.4 On September 1, 1999, the Department filed a Response to Respondent's Motion to Modify Order of Summary Action and attached Department's Exhibits 1-5.

1.5 On September 2, 1999, the Respondent filed a Declaration of Bernard Bauman in Reply to Department's Response, which was also signed by the Respondent. Attached were Respondent's Exhibits 1-6.

1.6 On September 2, 1999, the Presiding Officer conducted a telephone conference with the parties. In regards to his motion to modify, the Respondent elected not to present oral argument on his motion to modify on September 10, 1999. Instead, the Respondent requested to have the Board consider his Motion to Modify as soon as a meeting time could be arranged. The Presiding Officer informed the Respondent that

ORDER ON MOTION TO MODIFY  
EX PARTE ORDER OF SUMMARY ACTION - Page 2

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if he received a decision to his disfavor, he may make a motion to have an expedited hearing, but that he has waived his right to a prompt hearing, which was scheduled for September 10, 1999.

1.7 On September 3, 1999, the Presiding Officer conducted a second telephone conference with the parties. The Presiding Officer heard oral argument on the issue of timeliness. The Presiding Officer ruled that the Motion to Modify was timely filed. The Respondent had filed his Answer to Statement of Charges on August 27, 1999, and timely stated that he would be filing a Motion to Modify. Further, the Respondent had not requested a prompt hearing within 10 days of service, which was required under the rules, WAC 246-11-340(3). Next, the Presiding Officer ruled on the Department's objections to Respondent's Exhibits No. 1, No. 2 and No. 6, which were attached to Respondent's Reply Declaration. During a second prehearing conference conducted on September 3, 1999, the Presiding Officer provided clarification on how the corrected exhibits should be filed.

1.8 On September 7, 1999, the Respondent filed corrections to Respondent's Exhibit No. 2 and No. 6, and filed an additional exhibit, Respondent's Exhibit No. 7, which was a declaration by W. Bernard Bauman.

1.9 On September 7, 1999, the Board met to consider the Respondent's Motion to Modify Ex Parte Order of Summary Action.

## II. FINDINGS ON RESPONDENT'S MOTION TO MODIFY

The Respondent moved for an order modifying the Ex-Parte Order of Summary Action and staying the summary suspension of the licenses issued to Respondent and

ORDER ON MOTION TO MODIFY  
EX PARTE ORDER OF SUMMARY ACTION - Page 3

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Medicine Shoppe, located at 8430 State Street in Marysville, Washington. The Respondent requested that both licenses be reinstated. The Board considered the documents filed by the Respondent and reviewed the filed exhibits. The Board also considered the Department's arguments and the attached exhibits. The Board finds that the arguments and evidence provided by the Respondent inadequately addressed the existence of immediate danger to the public health, safety and welfare. The Respondent had committed serious violations of the pharmacy laws by operating the pharmacy below the standard of care. The Board could not be assured by the Respondent's assertions that he has corrected the problems and that he will remain in compliance. The Respondent has a history of committing violations of the pharmacy law, correcting the violations, but then violating the laws again. The Board finds that the concerns for the protection of the public outweigh the Respondent's assertions that the violations have been corrected.

### III. CONCLUSIONS OF LAW

The Board has authority to take emergency adjudicative action to address an immediate danger to the public health, safety, or welfare. RCW 34.05.422(4), RCW 34.05.479, RCW 18.130.050(7); and WAC 246-11-300. In this case, the Board considered the Respondent's arguments to modify the Ex Parte Order of Summary Action. The Board affirms that the existence of immediate danger to the public health, safety, or welfare remains. The Respondent's request to modify the Ex Parte Order of Summary Action did not adequately address the danger to the public health, safety or welfare. The Ex Parte Order of Summary Action, which was ordered on August 17,

ORDER ON MOTION TO MODIFY  
EX PARTE ORDER OF SUMMARY ACTION - Page 4

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1999, is necessary to address this danger to the public and is the least restrictive action justified by the danger posed. The Respondent's Motion to Modify Ex Parte Order of Summary Action should be denied.

**IV. ORDER**

Based upon the above, the Board hereby ORDERS that the Respondent's Motion to Modify Ex-Parte Order of Summary Action in this matter is DENIED.

DATED THIS 7<sup>th</sup> DAY OF SEPTEMBER, 1999.

**BOARD OF PHARMACY**

  
SHARRON SELLERS, Public Member, for  
C.A. LEON ALZOLA, R.Ph., Panel Chair

ORDER ON MOTION TO MODIFY -  
EX PARTE ORDER OF SUMMARY ACTION - Page 5

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## **Appendix G**

State of Washington  
Department of Health  
Board of Pharmacy

In the Matter of the License to Practice  
Pharmacy of: )

MICHAEL S. JONES, R.Ph.,  
License No. 10993 )

In the Matter of the Pharmacy Location  
License of: )

The Medicine Shoppe Pharmacy,  
License No. 55751, )

Respondents. )

) Docket No. 99-08-A-1016PH

) Docket No. 99-08-A-1017CF

) STIPULATED FINDINGS OF FACT,  
) CONCLUSIONS OF LAW AND  
) AGREED ORDER

The State of Washington Board of Pharmacy, by and through David M. Hankins,  
Assistant Attorney General Prosecutor and Michael S. Jones, R.Ph., represented by W. Bernard  
Bauman stipulate and agree to the following:

**Section 1: Procedural Stipulations**

1.1 Michael S. Jones, Respondent, was issued a license to practice pharmacy in the  
state of Washington in June 1980. Respondent's license to practice pharmacy in the state of  
Washington expires on October 24, 1999.

1.2 On October 25, 1999 the Board of Pharmacy issued an Amended Statement of  
Charges against Respondent.

1.3 The Statement of Charges alleges that Respondent violated RCW 18.64.160(5);  
.165(2), .245, .246, 270, 18.130.180(1), (4), (6), (7), (12), (13), 69.04.450, .490, .510, 69.41.030,

STIPULATED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND AGREED ORDER - PAGE 1

**ORIGINAL**

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.042, .050, 69.50.306, .308(d)(e), .401(f)(d); WAC 246-863-095(f), -110, 246-869-100(1)(2)(a)-(c),  
-130, -150, -160(4)(5), -190, -210, -230, 246-875-001, -020, -040, 246-901-080(2), -090, -100(3).

1.4 Respondent understands that the State is prepared to proceed to a hearing on the allegations in the Statement of Charges.

1.5 Respondent understands that he has the right to defend himself against the allegations in the Statement of Charges by presenting evidence at a hearing.

1.6 Respondent understands that, should the State prove at a hearing the allegations in the Statement of Charges, the Board of Pharmacy has the power and authority to impose sanctions pursuant to RCW 18.130.160.

1.7 Respondent and the Board of Pharmacy agree to expedite the resolution of this matter by means of this Stipulated Findings of Fact, Conclusions of Law, and Agreed Order (Agreed Order).

1.8 Respondent waives the opportunity for a hearing on the Statement of Charges contingent upon signature and acceptance of this Agreed Order by the Board of Pharmacy.

1.9 This Agreed Order is not binding unless and until it is signed and accepted by the Board of Pharmacy.

1.10 Should this Agreed Order be signed and accepted it will be subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any applicable interstate/national reporting requirements.

1.11 Should this Agreed Order be rejected, Respondent waives any objection to the participation at hearing of all or some of the Board members who heard the Agreed Order presentation.

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STIPULATED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND AGREED ORDER - PAGE 2

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## Section 2: Stipulated Facts

While Respondent does not admit to the following conduct, Respondent acknowledges that the evidence is sufficient to justify the following findings:

- 2.1 Respondent Medicine Shoppe Pharmacy located at 9430 State Avenue, Marysville, Washington was issued a location license to operate as a pharmacy in the state of Washington in October 1996. The current location license expires on June 1, 2000.
- 2.2 Respondent Michael Jones is the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.
- 2.3 On March 1, 1994, a Statement of Charges was issued against Respondent Michael Jones related to a prescription filling error while Respondent was working as a pharmacist at Safeway Pharmacy # 497 in Seattle, Washington.
- 2.4 On July 6, 1994, the Board entered a Findings of Fact, Conclusions of Law and Order placing Respondent's license to practice pharmacy in the state of Washington on probation for a period of one year and imposing certain terms and conditions. One of the conditions imposed on Respondent was a requirement that he create and submit a plan to avoid violations of pharmacy law related to the filling of prescriptions.
- 2.5 On December 7, 1995, Respondent's license to practice pharmacy in the state of Washington was fully reinstated.
- 2.6 In approximately October 1996, Respondent Jones purchased and operated The Medicine Shoppe in Marysville, Washington.
- 2.7 On December 17, 1998, Respondent Medicine Shoppe received a failing inspection grade of 79 from Board of Pharmacy Investigator Wenig while conducting a routine inspection of the pharmacy. An inspection score of 90-100 is classified as a passing pharmacy.

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STIPULATED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND AGREED ORDER - PAGE 3

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inspection score. An inspection score of 80-89 is classified as a conditional pharmacy inspection score. An inspection score of 0-79 is classified as an unsatisfactory pharmacy inspection score.

At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The violations included but were not limited to:

2.7.1 Failing to obtain chronic conditions on patients of the pharmacy;

2.7.2 Dispensing the majority of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber;

2.7.3 Various required records required by state and federal law were either inaccurate, incomplete or not available;

2.7.4 There was a box of filled prescription containers, many unlabeled, on the floor of the pharmacy.

2.7.5 Investigator Wenc discovered a prescription filling error in the will call area. A prescription for [REDACTED] was incorrectly filled with [REDACTED]

2.7.6 Many of the prescriptions in the will-call area had labeled expiration dates exceeding the manufacturer's expiration date;

2.7.7 Most of the prescriptions in the will call area contained the incorrect NDC number for the product in the prescription container;

2.8 On February 3, 1999, Board of Pharmacy Investigator Wenc conducted a re-inspection in relation to the December 1998 failing score. During the February 3, 1999 inspection, the pharmacy, received a passing score of 94. The deducted points were related to

STIPULATED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND AGREED ORDER - PAGE 4

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inaccurate, incomplete or missing records required by state or federal law. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.

2.9 On July 12, 1999; Board of Pharmacy Investigators Wene and Jeppesen conducted a routine inspection of the Medicine Shoppe Pharmacy in Marysville. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The pharmacy received an extremely low failing grade of 48. At that time the violations included but were not limited to:

2.9.1 Failing to obtain chronic conditions and allergies on patients of the pharmacy. Disease state management is coded in ICD-9 codes and provides the information in coded form, not readily readable by the Pharmacist.

2.9.2 Numerous (greater than 10) prescriptions were labeled with a different generic product than indicated on the label or NDC Code. Several of these prescriptions were dispensed in the presence of the Board of Pharmacy Investigators.

2.9.3 Dispensing the majority (in excess of 90%) of prescriptions in non-child-resistant containers without a written request from either the patient or the prescriber for non child-resistant packaging;

2.9.4 Thirty-eight (38) drug products were outdated. Of those, 18 drugs were legend or controlled substances and 20 were OTC products.

2.9.5 Various records required by federal law (DEA) were either inaccurate, incomplete or not available. DEA order forms and invoices could not be reconciled. Respondent was unable to locate several required DEA forms. There was poor organization of DEA inventory records,

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STIPULATED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND AGREED ORDER - PAGE 5

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including non-sequential filing. Several DEA records did not include date and amount received on DEA 222 forms.

2.9.6 DEA Inventory incomplete, DEA inventory for Schedules III-V was missing. Respondent was unable to generate reports for Schedule II drugs. The daily refill reports were not signed, stored in various locations, out of sequence, with several months not located.

2.9.7 Facts and Comparisons, the only reference source in the pharmacy, had not been updated for at least nine (9) months.

2.9.8 Pharmacy Assistant did not have a name badge and none had been ordered. No Pharmacy Assistant certificate had been generated or signed. Modifications to the Pharmacy Assistant Utilization Plan were in place without Board approval.

2.9.9 The prescription records were inaccurate, missing and poorly organized. Examples include prescription files with non-sequential order. Several prescriptions, both C-II and other drugs were unaccounted for. Prescription files were kept with no organization. Respondent Jones was unable to locate files in a timely manner.

2.9.10 Minimum procedures for utilization of the patient medication system were inadequate.

2.9.11 During the inspection, a patient returned a prescription so that Respondent Jones could correct the instructions for use. The correction was made but no audit trail of the change was entered in the pharmacy computer.

2.9.12 The pharmacy was generally disorganized and dirty. The pharmacy sink and immediate area were dirty and with numerous dirty food dishes.

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STIPULATED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND AGREED ORDER - PAGE 6

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2.10 On July 13, 1999, Investigator Jeppesen returned to the pharmacy to retrieve documents promised by Respondent Jones. At that time Respondent Jones stated he could not locate the documents. Respondent stated that his computer could generate the required reports but that he, (Respondent) did not know how to generate them.

2.11 On August 10, 1999, Investigators Wene and Jeppesen returned to the Medicine Shop Pharmacy in Marysville, Washington, to conduct the re-inspection in relation to the July 12, 1999 failing score. This inspection again resulted in an extremely low failing score of 56. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. At that time the violations included but were not limited to:

2.11.1 Six prescriptions selected randomly in the will call area did not have allergy or chronic conditions noted in the patient profile. The disease state - drug interaction fields had been turned off. Respondent Jones was unable to explain the purpose or the clinical significance of the clinical interaction levels that appeared for drug interaction messages.

2.11.2 Three prescriptions selected randomly from the will call area were labeled with a different generic product than indicated on the label and/or NDC Code.

2.11.3 Forty-one (41) prescriptions were located in the will call area. Of those, forty (40) were packaged in non child-resistant containers and the one that was in a child resistant container was in a container supplied by the manufacturer.

2.11.4 Eleven legend or controlled substances on the shelf were beyond the manufacturer's expiration date.

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2.11.5 As in the July 12, 1999 inspection, various records required by federal law (DEA) were either inaccurate, incomplete or not available. The invoices for the C II drugs were not filed separately. Several DEA records did not include date and amount received on DEA 222 forms.

2.11.6 DEA Inventory records incomplete. There was no signature on the C-II, C-III - C-V inventories. Requested records could not be located.

2.11.7 Five prescriptions which had been filled and returned to the stock area were checked for accuracy of product on the label and against correct NDC numbers. All five prescriptions failed to comply with state and/or federal law.

2.11.8 Minimum procedures for utilization of the patient medication system were inadequate. The pharmacy QS-I system was not able to create an accurate and complete audit trail for changes made to the prescriptions after filling including directions for use and drug dispensed.

2.11.9 During the period August 4, 1999 through August 5, 1999, forty-eight prescriptions were processed in the pharmacy. Of those forty-eight prescriptions, twenty-one did not have a hard copy in the prescriptions.

2.12 Respondent Michael S. Jones operated the Medicine Shoppe Pharmacy in a manner below the standard of care for the operation of a pharmacy and therefore placed the patients of his pharmacy at serious risk of significant harm.

2.13 That on or about 4-1-99, respondent refilled a prescription for patient A for [REDACTED] controlled substance. Respondent misfilled the prescription by filling it with [REDACTED]. Patient A consumed [REDACTED] over [REDACTED] period. Respondent had to be taken to the [REDACTED] at [REDACTED] Everett, Washington for treatment for a [REDACTED].

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2.14 That on or about 2-8-99, patient C was prescribed [REDACTED] by [REDACTED] physician and phoned in to respondent's pharmacy. The original prescription permitted substitution, but did not permit refills. Respondent failed to note in his phone prescription if substitution was permitted.

2.15 On or about 2-8-99, respondent filled the prescription for patient C with [REDACTED] Respondent without authorization from the physician refilled [REDACTED] prescription, and misfilled and mislabeled the medication with an increase in dosage strength on 3-1-99 and on 3-7-99 with [REDACTED]

2.16 Respondent failed to maintain the prescription hardcopy, failed to maintain accurate records and/or altered or manipulated the computer records by:

2.16.1 On 5-7-99, the pharmacy investigator obtained records from respondent's pharmacy. Patient C's medication profile record indicate respondent filled the prescription for [REDACTED] with a generic substitute [REDACTED] on 2-8-99, 3-1-99 and 3-7-99. The patient [REDACTED] indicated that they never received the medication on 3-7-99. Respondent's daily audit log for 2-8-99 indicates he filled the prescription with [REDACTED]. The investigator also received a previous copy of respondent's daily audit log for 2-8-99 which indicates that on 2-8-99, respondent filled the medication with [REDACTED]

2.17 That on or about 9-14-98, patient D obtained a prescription of [REDACTED] [REDACTED] tablets and had the prescription filled by respondent. The patient indicate [REDACTED] did not obtain a refill of the medication. The prescription authorized only one refill. Respondent's records indicate that he refilled the [REDACTED] on 1-8-99, 2-16-99, and 3-27-99 without authorization from the prescriber and/or billed the state for prescriptions never obtained by the patient.

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2.18 That on or about 10-23-98 patient D had respondent fill a prescription for [REDACTED]. The patient's physician only prescribed [REDACTED]. Respondent's records indicate that he filled a prescription for [REDACTED] and [REDACTED]. He refilled the [REDACTED] on 11-19-98, 11-30-98, and 3-27-98. Respondent's records indicate he also refilled the [REDACTED] on 11-19-98, 11-30-98, 12-5-98, 1-8-99, 2-16-99 and 3-27-99. The patient indicated that [REDACTED] never received any [REDACTED]. Respondent failed to maintain a hardcopy of the prescription and filled a prescription without authorization from the physician and/or billed the state for medication that a patient did not receive.

2.19 That on or about 2-15-99, respondent filled a prescription for patient D for [REDACTED] a controlled substance. Respondent's medication profile records for patient D show that respondent filled the prescription as [REDACTED] and also filled a prescription for [REDACTED]. Respondent filled and refilled the [REDACTED] prescription without the physician's authorization on 2-15-99, 2-25-99 and 3-22-99. Respondent also refilled on 3-22-99, the patient's prescription for [REDACTED]. The investigator was unable to locate a hard copy of the prescription for [REDACTED]. The patient indicated to the pharmacy investigator that [REDACTED] received the [REDACTED] but not the [REDACTED].

2.20 That on or about December 1998, patient D observed respondent provide an unlabeled prescription vial containing large white caplet shaped tablets, which appear to be [REDACTED] tablets, a controlled substance, to a person in exchange for respondent's car repair.

2.21 That respondent without the physician's authorization or approval refilled a prescription for [REDACTED] tablets for patient B on 4-3-99 and 4-29-99.

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2.22 That respondent misfilled patient F's prescription for [REDACTED] with [REDACTED] instead of [REDACTED] as prescribed by the physician.

### Section 3: Conclusions of Law

The State and Respondent agree to the entry of the following Conclusions of Law:

3.1 The Board of Pharmacy has jurisdiction over Respondent and over the subject matter of this proceeding.

3.2 The above facts constitute unprofessional conduct in violation of RCW 18.64.160(5), .165(2), .245, .246, .270, 18.130.180(1), (4), (6), (7), (12), (13), 69.04.450, .490, .510, 69.41.030, .042, .050, 69.50.306, .308(d)(e), .401(1)(d); WAC 246-863-095(i), -110, 246-869-100(1)(2)(a)-(c), -130, -150, -160(4)(5), -190, -210, -230, 246-875-001, -020, -040, 246-901-080(2), -090, -100(3).

3.3 For purposes of settlement, the state withdraws allegation 1.15 in the amended statement of charges and the violations outlined in paragraph 2.30.

3.4 The above violations are grounds for the imposition of sanctions under RCW 18.130.160.

### Section 4: Agreed Order

Based on the preceding Stipulated Facts and Conclusions of Law, Respondent agrees to entry of the following Order:

4.1 The Pharmacy location license of Medicine Shoppe Pharmacy, license No. 55751 shall be REVOKED. Respondent shall have no right to re-apply for a pharmacy location license for at least five (5) years from the date of this order. Respondent shall promptly deliver to the Board the original license and current registration.

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4.2 The license to practice pharmacy issued to Michael S. Jones, shall be **SUSPENDED WITHOUT STAY** effective from the date of August 17, 1999.

4.3 The respondent is prohibited from functioning in a pharmacy or any other drug-related employment during the respondent's suspension. The respondent will not make public appearances representing himself as a pharmacist.

4.4 Respondent's license to practice pharmacy shall be **Suspended With Stay** for at least 5 years from the date of January 13, 2000.

4.5 Respondent shall obey all federal, state and local laws and all administrative rules governing the practice of the profession in Washington.

4.6 Respondent shall assume all costs of complying with this Order.

4.7 If Respondent violates any provision of this Order in any respect, the Board of Pharmacy may take further action against Respondent's license.

4.8 Respondent shall inform the Board of Pharmacy, in writing, of changes in his residential address.

4.9 In the event respondent should leave Washington to reside or to practice outside the state, respondent must notify in writing the Board of Pharmacy of the date of departure and return. Periods of residency or practice outside Washington will not apply to the reduction of this probationary or suspension period.

4.10 The respondent shall submit written notification to the Board of Pharmacy, addressed to the Program Manager, of any employment or residence address changes. The notification shall include the complete new address and telephone number. The notification must be made within twenty (20) days of the change in employment or residence address.

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4.11 The respondent shall submit periodic declarations under penalty of perjury stating whether there has been compliance with all conditions of this Order. Failure to submit information and/or to make true statements may subject the respondent to referral for prosecution under RCW 9A.76.020 and/or RCW 9A.72.030.

4.12 The respondent shall advise any employer who hires him or her, to function in the capacity of a health care practitioner, of the terms of this Order imposed by the Board of Pharmacy. The Respondent's employer must submit written notification to the Board indicating he or she has seen the Board's Order.

4.13 The respondent shall submit a quarterly declaration under penalty of perjury stating whether there has been compliance with all conditions of this Order. The first report is due 30 days, and on the first day of April, July, Oct or Jan and thereafter until 1/1 unless otherwise ordered by the Board of Pharmacy.

4.14 Respondent shall notify Board of Pharmacy of any employment in the health care field, including any change in employment or practice status. Respondent shall, within twenty (20) days of the effective date of this Order, or as soon thereafter as deemed by the Board of Pharmacy, submit to the Board of Pharmacy for the Board of Pharmacy's approval, a job description or description of practice and clinical privilege of respondent's present practice or position. Thereafter respondent shall submit a job description or description of practice and clinical privilege of respondent's practice or position to the Board of Pharmacy for their approval prior to making the contemplated change.

4.15 Respondent shall cause the respondent's employer to submit quarterly performance reports directly to the Board of Pharmacy on forms provided by the Board of Pharmacy. The first report is due 30 days and on the first day of April, July, Oct or Jan.

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\_\_\_\_\_ and thereafter. The respondent shall ensure that the respondent's employer has been given a copy of this Order and the employer understands the decision of the Board of Pharmacy in this case. The respondent shall ensure that the employer makes reference to Board of Pharmacy decision in the reports to the Board of Pharmacy.

4.16 The respondent is hereby placed on notice that it is the responsibility of the respondent to ensure that all required reports are submitted to the Board of Pharmacy in a timely manner.

4.17 Within thirty (30) days of the effective date of this Order, or as soon thereafter as deemed by the Board of Pharmacy, respondent shall make an appointment to undergo a psychological evaluation by a psychologist designated by the Board of Pharmacy who shall furnish a report to the Board of Pharmacy according to the following protocol adopted by the Board of Pharmacy:

Please perform a psychological examination to assess:

1. Psychological diagnosis, if any.
2. Treatment recommendations, if any.

The evaluation should consist of the following components:

1. A complete social, past medical, developmental and psychological history.
2. A review of this Agreed Order.
3. Any other physical examinations, psychological or laboratory studies deemed necessary by the evaluator.

The report of examination should discuss fully and with specificity the basis for the diagnosis, if any, conclusions and recommendations made pursuant to items 1-3 in the first paragraph above. The report of examination should be sent to:

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Board of Pharmacy  
PO Box 47863  
Olympia WA 98504-7863

A copy shall be provided to the Respondent.

4.18 Within sixty (60) days of the effective date of this decision, or as soon thereafter as deemed by the Board of Pharmacy, respondent shall submit to the Board of Pharmacy for its prior approval, a program of remedial education, related to the violations found in the decision. The exact number of hours and the specific content of the program shall be determined by the Board of Pharmacy and shall not total less than twenty-five (25). This program shall be in addition to the Continuing Education requirement for re-licensure. The Board of Pharmacy may also require respondent to pass an examination related to the content of the program.

4.19 Respondent shall submit to the Board of Pharmacy for its prior approval, a clinical education program related to the violations found in the decision. The exact number of hours and the specific content of the program shall be determined by the Board of Pharmacy and shall total not less than four (4) nor more than twenty (20) hours per week. Respondent shall complete the clinical training program prior to seeking modification. The Board of Pharmacy may require the respondent to pass an examination related to the content of the program.

4.20 Respondent shall take and pass the MPJE examination within 60 days from the date of this order. Failure to pass the examination may result in the suspension of the license until such time as a passing score is achieved. Respondent shall not engage in the practice of the profession until respondent has passed the examination and has been so notified by the Board in writing.

4.21 Respondent is prohibited from serving as the responsible manager of a pharmacy or supervising pharmacy interns.

**4.22 SUPERVISING PHARMACIST AGREEMENT**

The supervising pharmacist signs an agreement that they:

1. Have reviewed, are aware of, and understands the terms of the Order.

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2. Agree to be a supervising pharmacist and provide quarterly reports concerning:
  - a. obey the laws and rules of practice of pharmacy;
  - b. obey rules of employment and job performance;
  - c. relationship with other employees and customers;
  - d. any other relevant matters.

#### LEVELS OF SUPERVISION

- X Specific Percentage Supervision requires that a supervising pharmacist have contact with and/or personally be present for supervision at least forty (40) percent of the time or 2 ½ hours – 3 ½ hours per day;

This percentage may be decreased by the reviewing board member upon submission of an employment description to 40 percent the first year, 30 percent the second year, and 20 the third year or less as the discretion of the reviewing board member.

- 4.23 The respondent shall submit to the Board of Pharmacy, within thirty (30) days of the effective date of the Order, policy and procedures relating to:

the process of receiving written and telephone prescriptions, filling the prescriptions, and checking the label and the product to prevent errors;

disposition of prescription filling errors which shall include, but not be limited to: documentation of filling errors, description of filling errors, explanation of how filling errors occurred, notification of patient and physician, and steps to be taken to prevent future errors;

error reports shall be kept for two (2) years;

A Pharmacy Board Investigator will contact the respondent to determine if the respondent is in compliance with the policy and procedures.

- 4.24 The respondent must implement a quality assurance program with thirty (30) days of receipt of the Order.

The quality assurance program is directed at prescription filling and misfilling and the number of errors in filling or labeling prescriptions. The respondent shall maintain a log of all errors in prescription filling. The log shall be maintained at the pharmacy and made available to Pharmacy Board Investigators and Staff at their request.

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— Develop an effective quality assurance set of criteria or guidelines by which to monitor patient profiles for inappropriate, excessive or non-therapeutic quantities of medications. An outline of the process and screening questions must be submitted to the Disciplinary Authority for approval.

A Pharmacy Board Investigator will contact the Respondent to determine if the respondent is in compliance with the quality assurance program.

4.25 The Respondent shall comply with the Board's probation surveillance program including appearing in person for interviews upon request at various intervals and with reasonable notice.

4.26 Respondent may submit a written request for modification of the Board's Order for his pharmacist license only, no sooner than three years from the date of this order. Respondent, at the Board's discretion shall personally appear before the Board of Pharmacy

4.27 At the conclusion of the stayed suspension, Respondent, if requested by the Board, shall appear before the Board of Pharmacy prior to seeking reinstatement of his license to practice pharmacy.

4.28 Respondent shall assume all costs associated with the compliance of this Order.

4.29 If the respondent violates any provision of this Order in any respect, the Board of Pharmacy, after giving the respondent notice and the opportunity to be heard, may **SET ASIDE THE STAY ORDER AND IMPOSE THE SUSPENSION OF THE RESPONDENT'S LICENSURE OR MAY** impose any sanction as appropriate under RCW 18.130.160 to protect the public, or may take emergency action ordering summary suspension or restriction or limitation of the respondent's practice as authorized by RCW 18.130.050.

4.30 Within 10 days of the effective date of this order, Respondent shall thoroughly complete the attached Healthcare Integrity and Protection Data Bank Reporting Form (Section 1128E of the Social Security Act) and return it to the disciplining authority.

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IT IS FURTHER ORDERED that all parties shall be bound by the terms and conditions of this Order. Any failure to comply with the terms and conditions of this Order will subject the respondent's license to practice as a pharmacist to further disciplinary action.

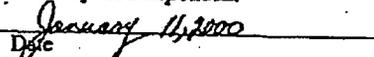
I, Michael S. Jones, Respondent, certify that I have read this Stipulated Findings of Fact, Conclusions of Law and Agreed Order in its entirety; that my counsel of record, if any, has fully explained the legal significance and consequence of it; that I fully understand and agree to all of it; and that it may be presented to the Board of Pharmacy without my appearance. If the Board accepts the Stipulated Findings of Fact, Conclusions of Law and Agreed Order, I understand that I will receive a signed copy.

  
Michael S. Jones, R.Ph.  
Respondent

  
Date

  
W. Bernard Bauman

WSBA #8849  
Attorney for Respondent

  
Date

**Section 5: Order**

The Board of Pharmacy accepts and enters this Stipulated Findings of Fact, Conclusions of Law and Agreed Order.

DATED this 4 day of February, 2005.

State of Washington  
Department of Health  
Board of Pharmacy

*C. Alzola R.Ph.*

C. ALZOLA, R.PH  
Panel Chair

Presented by:

*David M. Hankins*

DAVID M. HANKINS  
WSBA #19194  
Assistant Attorney General Prosecutor

Notice of Presentation Waived and Approved  
As to Form:

*W. Bernard Barman*

W. Bernard Barman  
WSBA #8849  
Attorney for Respondent

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