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67749-7

NO. 67749-7-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

JOSEPH JANASZAK, DDS,

Appellant,

v.

STATE OF WASHINGTON, et al.

Respondents.

FILED  
~~COURT OF APPEALS DIV I~~  
~~STATE OF WASHINGTON~~  
2012 FEB 13 AM 10:58

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## I. NATURE OF THE CASE

The plaintiff, Joseph Eric Janaszak, is a dentist, licensed to practice in the state of Washington. Charges of unprofessional conduct were brought against him before the Dental Quality Assurance Commission (DQAC), a board of practicing dentists appointed by the governor, charged by statute with the responsibility of regulating the conduct of dentists in the state of Washington. The charges arose out of complaints made to the Department of Health (DOH) by two women in 2006 that Dr. Janaszak had engaged in sexual relations with them while they were patients of his, and that various actions of his in connection with those sexual relationships were also improper and unprofessional.

Dr. Janaszak admitted that he had indeed had sexual relationships with the women who brought the allegations forward. CP at 152-53, 197. He admitted also that both of the women had been patients of his before the sexual contact began. CP at 152-53, 197. He further admitted that had these sexual relationships taken place during the time that they were patients of his, this would have constituted professionally improper conduct. CP at 152-53, 197. However, he denied that either complainant had been a patient at the time of the sexual relationships. CP at 139-40, 145-46, 197.

The complaining witnesses strongly contradicted this, and stated throughout in the disciplinary proceedings that in fact they had been his patients at the relevant times. CP at 92-118, 372-86.

Charges of professional misconduct were brought against Dr. Janaszak on January 12, 2007; and on January 16, 2007, the DQAC entered *ex parte* a summary order restricting Dr. Janaszak from practicing dentistry on female patients ages 12 and above, pending the outcome of the charges. After they were subjected to depositions, the complaining witnesses refused to cooperate further with the disciplinary process or attend the scheduled hearings, whereupon the charges were withdrawn without adjudication, and the restriction on Dr. Janaszak's practice was lifted on March 21, 2007.

Dr. Janaszak brought this action nearly three years later, on March 10, 2010. It was dismissed in its entirety on the defendants' motion for summary judgment, on September 2, 2011. CP at 398-99. Plaintiff has now appealed from this judgment of dismissal.

## **II. STATEMENT OF FACTS**

### **A. Material Facts**

The facts of the case are best viewed against the Washington Healthcare regulatory laws. The DOH, through its separate boards and commissions, is vested with the responsibility of licensing and monitoring

the practice of health care providers in the state of Washington. This licensing and monitoring occurs under the auspices of the Uniform Disciplinary Act (UDA), Ch. 18 RCW. The purpose of the UDA is to “assure the public of the adequacy of professional competence and conduct in the healing arts.” RCW 18.130.010.

The UDA protects the public from health care professionals’ misconduct, both when the health care professional does not realize that his or her conduct constitutes misconduct and when the professional does. *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 602-03, 903 P.2d 433 (1995) (citing *Tomlinson v. State*, 51 Wn. App. 472, 479-80, 754 P.2d 109 (1988); and *In re Flynn*, 52 Wn.2d 589, 328 P.2d 150 (1958)).

In this case, in early 2006 the DQAC received separate complaints from two women, alleging that Dr. Janaszak had engaged in sexual relations with each of them while they were patients of his, and characterizing the sexual and related conduct as improper and unprofessional in various ways, and inconsistent with the professional standards required of a dentist. These patients are referred to in the redacted records and in the proceedings below as B.G. and A.H. Their specific complaints were detailed in the investigative report of the DOH investigator, Chyma Miller-Smith (one of the named defendants in this action). CP at 86, 92-97, 111-18, 372-86.

Dr. Janaszak admits that he had sexual relationships with these individuals, who had been patients of his, and that it is prohibited for a dentist to have sexual relationships with patients. CP at 152-53. He claimed, however, that neither of these individuals were patients at the time of his intimate relationships with them. He also maintained that their allegations that they were patients at the time of the relationships were lies. CP at 12-13, 145-46, 152-53.

Upon the submission of the initial complaints from B.G. and A.H., the DQAC authorized an investigation thereof. CP at 130-31, 388-94.

After the completion of her investigation, Ms. Miller-Smith turned her report over to her supervisor; she made no recommendations and had no role in the decision-making with regard to the DQAC disciplinary process, as her task was limited to the investigation of the complaints. CP at 86-87.

Thereafter, on January 12, 2007, a Statement of Charges based upon these complaints was brought against Dr. Janaszak by the Deputy Executive Director of the DQAC, on designation by the Commission, Kirby Putscher (also a defendant in this case). CP at 46-47, 49-50.

The handling of the disciplinary proceeding was undertaken by Assistant Attorney General Kim O'Neal on behalf of the DQAC. CP at 46-47.

On January 16, 2007, the DQAC entered an Order *ex parte* of Summary Action, supported by findings of fact and conclusions of law, summarily restricting Dr. Janaszak from treating female patients over the age of 12 pending further proceedings. CP at 54-55. The stated basis of the summary action was a pattern of misconduct with adult female patients, showing a lack of maintenance of appropriate professional boundaries, and that such boundary violations are likely to continue unless a summary restriction was put into place. CP at 56-60.

The charges and Order *ex parte* were then served upon Dr. Janaszak, who, through his attorneys on January 23, 2007, denied the charges and elected for a prompt hearing on February 5, 2007, in regard to the Order. CP at 56-60.

Subsequently, the hearing date was reset to April 4-6, 2007, as a result of agreements between counsel to allow discovery and preparation. CP at 79.

The charges were amended to include allegations by a third complainant, which was later withdrawn. CP at 61-75. In the aftermath of initial deposition sessions of the original claimants taken by Dr. Janaszak's counsel, these individuals, for their own personal reasons, declined to participate in further depositions or in the scheduled hearing.

Accordingly, the charges were withdrawn without adjudication, and the practice restriction was fully lifted, effective March 21, 2007. CP at 47.

Dr. Janaszak contended that complainants B.G. and A.H. were lying when they stated that their sexual relationships took place during the patient-dentist relationship. CP at 145-46. He also stated that they engaged in various falsehoods in regard to specifics of these relationships. On the other hand, their statements and testimony were to the contrary. Indeed, with respect to B.G., Dr. Janaszak, who began a sexual relationship with her sometime in the March-April 2005 time period, did not even want to acknowledge that she had been a patient in his office as recently as January 2005, and contended that he was not aware of “who she was” in that regard when the relationship began. CP at 147-55, 161. This contradicts both his office records and the statements of the complainant. CP at 176-86. Similarly, while Dr. Janaszak acknowledges performing dental work on the other claimant, A.H., in the summer of 2005, he stated that their sexual relationship was long over by that time. She, however, directly contradicted this. CP at 176-86.

In sum, Dr. Janaszak admitted to having sexual relationships with B.G. and A.H., acknowledged that they had been patients, and admitted that these sexual relationships would have been professionally improper had they taken place while the individuals were still patients. He denied

that they were patients at the time of the sexual relationships. B.G. and A.H. contradicted him directly; the point being, of course, that this was still very much at issue when the complainants decided to go no further in cooperation with the disciplinary matter that their complaints had initiated.

**B. Response To Plaintiff's Statement Of Facts**

There are numerous instances in the plaintiff's "Statement of the Case," beginning at page 3 of the Appellant's Brief (Appellant's Br.) where the stated facts are wrong, and actively misleading. Examples of these follow.

Plaintiff states that the DOH opened an investigation of Patient A's complaint on January 30, 2006, but that the DQAC did not authorize the investigation until February 14, 2006. Appellant's Br. at 3. Similarly, he states that the DOH began an investigation of Patient B's complaint on February 28, 2006, but that the DQAC did not authorize the investigation until March 1, 2006 (i.e., one day later!). Appellant's Br. at 4.

However, this is completely unsubstantiated by the record. The opening of a file by DOH upon the receipt of a complaint is not equivalent to the authorization of the investigation by the DQAC, and necessarily happens before authorization. This is only one example of the plaintiff's groundless attempts to suggest that the investigation of the complaints against him were somehow wrongful.

In a similar vein, plaintiff at various places in his brief asserts that the DOH investigator knew that B.G. and A.H. were “colluding,” and he seems to assert, without any legal explication, that such “collusion” by the complainants somehow imputes wrongdoing to DOH. *See, e.g.*, Appellant’s Br. at 4-5. However, the fact that both complainants were communicating with each other was not only clearly set out in the investigator’s reports, it is hardly surprising, because the fact that these patients each discovered that Dr. Janaszak was simultaneously “dating” the other was merely a consequence of Dr. Janaszak’s own actions. This is clearly shown in the investigative summaries of both cases. CP at 92-118, 372-86. This is simply a virtually inevitable consequence of professional misconduct with two patients during overlapping time periods.

Plaintiff also suggests in his brief that the investigator somehow “wrote up” the complaints herself for the complainants, and by this technique attempts to impugn, without analysis, the investigation itself. *See* Appellant’s Br. at 19. A similar technique is to quote the investigator’s comment that plaintiff might “attorney up,” and to object to the investigator’s brief conversation with him at his office about billing matters after the investigation was initiated. The complete response to these efforts are found in the reports of the investigations themselves, and

the statements of the parties and witnesses, all of which are in the record, and all of which document a thorough and impartial investigation of serious allegations. *See* CP at 250-56, 372-86.

The most serious mischaracterization of the record, however, is found in Appellant's Brief at 6-7, 19, and 25, which in turn perpetuates a parallel attempt to mislead the trial court at the time of the summary judgment motion as to the evidence which was submitted by the DOH to the DQAC in support of its original motion for a summary practice restriction in January 2007. These assertions by plaintiff are that when the original information was submitted to the Commission, the investigator (and the Assistant Attorney General, Kim O'Neal) *failed to include* Dr. Janaszak's "side of the story," in other words, failed to include his detailed denials of B.G.'s and A.H.'s allegations, and failed to include the information obtained from his office staff which was exculpatory. This implication is flatly false, as was thoroughly demonstrated when it was advanced before the trial court. *See* CP at 357, 372-86. In fact, the material submitted to the DQAC at the time of the motion for the summary practice restriction, set out in full detail both Dr. Janaszak's responses and those of his witnesses. CP at 357, 372-86. On appeal, the plaintiff attempts to obscure this ineluctable fact by stating that the investigator did not attach to her original DQAC declaration

Dr. Janaszak's written statement, or her file memos regarding her interviews with her staff. Appellant's Br. at 6-7, 19, 25. This is entirely disingenuous, because the full substance of both of those matters was set forth in complete detail in the material submitted by DOH to the Commission. A review of the record as cited above thoroughly disposes of this claim.

### **III. THE PROCEEDINGS BELOW**

It is worthwhile to comment upon aspects of the proceedings in this case at the superior court level. These bear particularly upon the question of the adequacy of the record submitted by plaintiff in opposition to the State's summary judgment, and thus upon its adequacy on appeal.

Plaintiff conducted very little discovery during the one-and-a-half years that this case was pending in superior court; indeed "very little" rather exaggerates the extent of what was done. Dr. Janaszak filed a 23-page Amended Complaint alleging fourteen "causes of action," and naming as defendants, besides the DOH and the DQAC, six individuals. CP at 20-42. These individuals included the DOH investigator, Chyma Miller-Smith, the Case Administrator of Health Quality Assurance Commissions, Kirby Putscher, and four members of the DQAC: Dr. Davis, Dr. Faine, Dr. Sinha, and Dr. Peterson (private dentists appointed to the DQAC by the governor). CP at 20-42. Notwithstanding this broad

Complaint, with its multiple claims and defendants, Dr. Janaszak took no depositions of any of these defendants other than that of Ms. Miller-Smith, and pursued no specific discovery with regard to any of his claims against these individuals.

Essentially, at the trial court level and on appeal, the record submitted by plaintiff is devoid of any specific evidence at all beyond a collection of documents assembled by plaintiff and purportedly “authenticated” by his counsel from the investigative and other files from the underlying disciplinary proceedings. CP at 250-56. Even the foundation for these documents, beyond their bare authenticity, was completely lacking in any evidentiary context, but consisted only of the conclusory and argumentative assertions of plaintiff’s counsel as to their meaning. Because these assertions (as opposed to the documents themselves) were not based upon testimonial knowledge, they were objected to by the State. *See also* CP at 250-56, 355-56, 395-96.<sup>1</sup>

Even the declaration that Dr. Janaszak himself submitted in opposition to the State’s summary judgment motion contained no substantive assertions at all, but addressed only an issue of claimed damages. CP at 351-52.

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<sup>1</sup> The trial court did not specifically rule upon those objections, but presumably considered only those matters admissible under CR 56. *See* the Court’s order at CP at 398-99, indicating consideration of the objections.

In reviewing the record, this court will thus see that there is essentially a total lack of substantive evidence developed during the course of the case which would substantiate *any* of plaintiff's claims, quite apart from the legal obstacles to these claims presented by the statutes and cases. For but one example, the plaintiff claims that the DQAC did not act in "good faith" in entering the temporary summary practice restriction against him. Yet he never deposed any of the DQAC members whom he named as defendants, nor did he ever do anything else in any attempt to show why they did what they did (beyond their stated intention to protect patients and the public)! Similarly, while he alleged intentional torts against all defendants, including claims under 42 U.S.C. § 1983, he developed no evidence through deposition, or otherwise directed to any defendants actions, motivations, or states of mind. Thus he argues in a complete factual vacuum on these points, and on most others.

These matters will be addressed with more specificity in the appropriate context below, but an understanding of this background at the outset is valuable.

#### **IV. ARGUMENT**

##### **A. The Summary Judgment Standard**

It is an axiom that summary judgment is appropriate where the evidence, viewed in the light most favorable to the nonmoving party,

demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condo. Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

The standard for appellate review of the granting of a summary judgment is *de novo* *Allen v. State*, 1118 Wn.2d 753, 757, 726 P.2d 200 (1992).

To defeat summary judgment, a nonmoving plaintiff must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the asserted claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

In this case, the State agencies and the individual defendants directly challenged plaintiff's ability to come forward with any material evidence in support of his claims.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *review denied*, 118 Wn.2d 1023 (1992) (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)). A moving defendant may meet this initial burden by pointing out

to the court that there is an absence of evidence to support the plaintiff's case. *Young*, 112 Wn.2d at 225. This may be done with or without supporting declarations.

If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also T. W. Elec. Serv. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630-32 (9th Cir. 1987).

In *Celotex*, the United States Supreme Court explained this result:

In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an initial element of the non-moving party's case necessarily renders all other facts immaterial.

477 U.S. at 322-23.

*Young v. Key Pharmaceuticals* expressly adopted the *Celotex* reasoning and procedure. *Young*, 112 Wn.2d at 225-26. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Therefore, as it pertains to this case, our supreme court in *Young* requires that, whether or not any particular issue is “backed” by declaration submitted by the moving party, the plaintiff had the burden of affirmatively establishing in response to the motion that there is an issue of material fact as to each element of each cause of action asserted in the Amended Complaint. He could not meet this burden and the motion was properly granted.

**B. The Defendant Commissions, Their Members, And Those Acting On Their Behalf Are Absolutely Immune To Plaintiff's Claims**

The DQAC is an independent commission, separate from the Department of Health and the Secretary of Health, whose members are appointed by the governor and are authorized by statute to conduct licensing actions under Chapter 18.130 RCW, the Uniform Disciplinary Act (UDA). RCW 18.32.0351, 18.32.0353, 18.32.039. DQAC members serve at the pleasure of the governor, so the Secretary of Health has no control over their actions. RCW 18.32.0353. Under the UDA, members of board and commissions, as well as the Secretary of Health, are immune from liability for actions involving disciplinary proceedings, as are those acting on their behalf. *See* RCW 18.130.300, which provides as follows:

**Immunity from liability.** (1) The secretary, members of the boards or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal,

based on any disciplinary proceedings or other official acts performed in the course of their duties.

DQAC members also enjoy an additional grant of immunity for all acts undertaken in the good faith performance of their duties under RCW 18.32.0357, which provides that:

The members of the commission are immune from suit in an action, civil or criminal, based upon its disciplinary proceedings or other official acts performed in good faith as members of the commission.

Therefore, the actions of the named members of the DQAC, and the Health Secretary, are entitled to absolute immunity to the plaintiff's lawsuit.

Plaintiff presents no valid authority contravening the immunity provided in RCW 18.130.300. The statute is not ambiguous—the plain meaning of the words shows that it was intended to provide a broad grant of immunity to DOH employees and members of boards and commissions. First, the statute includes reference to both civil and criminal actions. It also specifically refers broadly to immunity for “any action, civil or criminal,” based on “any disciplinary proceedings or other official acts.” When interpreting a statute, “this court is required to assume the Legislature meant exactly what it said and apply the statute as written.” *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196, 201 (2005) (quoting *In re Custody of Smith*, 137 Wn.2d 1, 8, 969 P.2d 21 (1998)).

The Legislature used broad terms encompassing all aspects of the work of those engaged in disciplinary proceedings.

In conclusory statements not supported by evidence, plaintiff suggests that the DOH investigator and other DOH employees are not entitled to immunity because they were not acting within the scope of employment. *See* Appellant's Br. at 11-12, 18-19. This assertion seems to be primarily based on plaintiff's argument that because he believes the actions were not "impartial," they were outside the scope of employment. But the admissible evidence is that the investigator was employed by DOH to undertake disciplinary investigations authorized by the various boards and commissions. *See* CP at 367-87. She undertook investigations of this plaintiff pursuant to the authority granted by the Commission members. Simply because the plaintiff does not care for the manner in which the investigation was conducted, does not mean that it was not permitted by statute. Similarly, it does not mean that the actions are not subject to the immunity provisions of RCW 18.130.300.

**C. Quasi-Judicial Immunity**

In addition to the statutory immunities afforded to DQAC and its employees, the defendants are entitled to quasi-judicial immunity under common law. Under the doctrine of quasi-judicial immunity, Washington courts have consistently ruled that officials who perform functions similar to

those performed by judges and prosecutors are similarly entitled to absolute immunity, as well as any individuals acting on their behalf—executive, investigator, etc. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 97, 829 P.2d 746 (1992); *Taggart v. State*, 118 Wn.2d 195, 204, 822 P.2d 243 (1992); *Creelman v. Svenning*, 67 Wn.2d 882, 410 P.2d 606 (1966).

As stated by the court in *Lutheran Day Care*:

Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions. See, *Butz v. Economou*, 438 U.S. 478, 512-14, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). Thus, quasi-judicial immunity is absolute.

*Lutheran Day Care*, 119 Wn.2d at 99.

In Washington, quasi-judicial immunity has been applied to a variety of administrative agencies which exercise judicial-like functions. See *Taggart*, 118 Wn.2d at 204 (Board of Prison Terms and Paroles); *Creelman*, 67 Wn.2d at 882 (County Prosecutor); *Grader v. City of Lynnwood*, 53 Wn. App. 431, 767 P.2d 952 (1989) (City Council and Hearings Examiner); *Rayburn v. City of Seattle*, 42 Wn. App. 163, 709 P.2d 399 (1985) (Police Pension and Disability Board). The quasi-judicial immunity of such boards extends to the government entities that employ them. *Creelman*, 67 Wn.2d at 885; see also *Hannum v. Friedt*, 88 Wn. App.

881, 947 P.2d 760 (1997) (Department of Licensing and director and administrator of DOL).

The determination as to whether an administrative body is entitled to quasi-judicial immunity is made by comparing the adjudicative process of the body to traditional judicial functions. *Taggart*, 118 Wn.2d at 204. In *Taggart*, the court articulated guidelines for analyzing whether the administrative action is functionally comparable to judicial action. *Id.* at 205. As is stated by the court:

In order to determine whether an administrative action is functionally comparable to judicial action, however, one must first define judicial action, a precise definition of which is probably neither possible nor desirable. Although the proceedings properly called "judicial" share similarities, no one attribute is essential to qualify an action as judicial, provided the action has enough other relevant attributes. *Raynes v. Leavenworth*, 118 Wn.2d 237, 243, 821 P.2d 1204 (1992); see generally L. Wittgenstein, *Philosophical Investigations* Paras. 67-67 (1958) (explaining concepts defined only in terms of "family resemblances"). Therefore, whether a challenged administrative action is functionally comparable to judicial action depends on various factors, such as whether a hearing was held to resolve an issue or controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts have performed, and whether safeguards exist to protect against errors.

*Taggart*, 118 Wn.2d at 205.

The judicial nature of the functions performed by the DQAC is made apparent upon review of the purpose served by the program and the

procedures under which it operates. *See* Ch. 18.130 RCW. By statute, the UDA applies to proceedings involving dentistry. RCW .039. The Administrative Procedures Act, Chapter 34.05 RCW, applies to give procedural safeguards. RCW 18.130.100. These procedures include the administration of oaths, the issuance and enforcement of subpoenas, and the conduct of discovery. In cases where unprofessional conduct is found, the disciplining authority must issue written findings of fact. RCW 18.130.110. The disciplining authority is also vested with a broad array of enforcement authority. RCW 18.130.160.

In *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995), the supreme court emphasized that the doctrine of judicial immunity shielding both the individual judge and the court as an entity was still the appropriate analysis under Washington law. As stated by the court in *Savage*:

Quasi-judicial immunity is designed to protect the government, not the individual employee, from suit. The doctrine of exemption of judicial and quasi-judicial officers (the prosecuting attorney comes within the second classification) is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public, and to insure active and independent action for the officers charged with the prosecution of crime, for the protection of life and property. *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935); see also *Taggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243 (1992) (the purpose of judicial immunity is not to protect judges as individuals but to safeguard the independence of the judiciary) (citing *Adkins v. Clark County*, 105 Wn.2d 675, 677, 717 P.2d 275 (1986)).

*Savage*, 127 Wn.2d at 441.

The actions of the DQAC adjudicating the determination of unprofessional conduct meet the requirements to qualify as a quasi-judicial body.

In addition, this court has held that the individual immunity outlined in statute extends to the State and the agency. *Dutton v. Wash. Physicians Health Program*, 87 Wn. App. 614, 619, 943 P.2d 298 (1997). In that case the immunity of the Medical Disciplinary Board was extended to DOH and the State. *Dutton*, 87 Wn. App. at 619. Following the rationale in *Savage*, the court discussed the difference between the personal qualified immunity of individual state actors which does not extend to the State or its entities (*see, e.g., Babcock v. State*, 116 Wn.2d 596, 616-19, 809 P.2d 143 (1991)) versus the quasi-judicial immunity which does extend to the State and its entities. *Savage*, 127 Wn.2d at 441.

It must be noted again that DOH has no control over DQAC since it is an independent board appointed by the governor. RCW 18.32.0351. But, similar policy considerations would warrant recognizing the extension of quasi-judicial immunity to the Commission as well. To allow it to be sued when its members (who are immune under two separate statutes) undertake their statutorily-mandated roles as prosecutor and

decision-maker of actions under the Uniform Disciplinary Act would have a chilling effect on the Commission's ability to protect the public from wrongdoing by health care providers. It would thwart efforts to monitor and regulate health care providers' performance. As recognized by this court in *Dutton*, the quasi-judicial immunity of the disciplinary authority extends to the entity whose members have immunity under RCW 18.130.300. *Dutton*, 87 Wn. App. at 619.

Plaintiff's argument in his brief on appeal in regard to this strong statutory and case law establishing immunity is, on the one hand, to suggest that because the DQAC entered a summary practice restriction against him restricting him from treating female patients age 12 and above, while the Assistant Attorney General had asked for a restriction as to adult women, the Commission acted in "bad faith." *See* Appellant's Br. at 15-18. On the other hand, he argues that the investigator, defendant Ms. Miller-Smith, acted "outside the scope of her duties" and thus she and the DOH are not entitled to immunity.

The fundamental problem with the first argument is that Dr. Janaszak presented no evidence whatever to the trial court as to why the members of the DQAC did what they did. What was undisputed was that there were serious allegations of sexual misconduct by plaintiff with female patients. Evidently, from the terms of the summary order, the

Commission concluded that a greater restriction was required than that requested in the motion to protect patients from sexual exploitation. The court cannot, however, as the plaintiff does, simply conclude that the fact that they did so is evidence of “bad faith.” The question is inescapable: is the fact that a judicial or quasi-judicial tribunal acted in a certain way based upon evidence before it, by itself “substantial evidence” of “bad faith” on the part of the tribunal members? The answer must be, no.

**D. Plaintiff’s 42 U.S.C. § 1983 Claims Fail As A Matter Of Law**

Dr. Janaszak alleged violations of 42 U.S.C. § 1983 against all defendants, without distinction, in his 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> “causes of action” in the Amended Complaint. There are several reasons why these claims were correctly dismissed by the trial court.

**1. No § 1983 Liability For Official Acts**

Neither the state of Washington, nor its agencies, nor their officials or employees acting in their official capacities are subject to suit under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Callahan v. City of Philadelphia*, 207 F.3d 668, 669-670 (3rd Cir. 2000).

The Washington State Supreme Court has also ruled that the State, its agencies, and employees in their official capacities are not subject to

suit under 42 U.S.C. § 1983. *Rains v. State*, 100 Wn.2d 660, 667, 674 P.2d 165 (1983); *Edgar v. State*, 92 Wn.2d 217, 221, 595 P.2d 534 (1979) (waiver of sovereign immunity did not subject state to suit under 42 U.S.C. § 1983).

## **2. No Vicarious Liability Under § 1983**

There can be no “Section 1983” liability based upon any principles of vicarious liability or respondeat superior. A defendant to be subject to suit under § 1983 must have personally participated in and caused the alleged deprivation of federal constitutional rights. *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). This inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Plaintiff must show that the individual defendant performed an affirmative act, participated in another’s affirmative act, or omitted to perform an act which he was legally required to do. *Ashcroft*, 556 U.S. at 662. Even where a defendant has the authority to control the offending subordinate, it must be demonstrated that the defendant implicitly authorized, approved or

knowingly acquiesced in the unconstitutional conduct of the offending subordinate. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984).

**3. Only Deliberate Misconduct Or Deliberate Indifference Can Support § 1983 Liability In This Case**

Negligence claims do not constitute the deprivation of a federal constitutional right under § 1983. Only claims of deliberate misconduct or deliberate indifference are actionable under the circumstances of this case. *E.g.*, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986). Even gross negligence does not amount to a constitutional violation. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). This is a very high standard. It equates to criminal *mens rea* for recklessness. *Farmer v. Brennan*, 511 U.S. 825, 839-40, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

In this case, the plaintiff made no attempt in the Amended Complaint to tie any factual allegations to any individual for § 1983 purposes, much less any which rose to the level of intentional deprivation of federal constitutional rights. Even since the complaint was filed, plaintiff has never articulated any § 1983 claim against any individual defendant other than Ms. Miller-Smith, including during the motion

proceedings and on appeal. Most individual defendants are never even mentioned outside the complaint itself.

In short, to even rise to the level of a § 1983 claim (and entirely apart from immunity defenses thereto, as discussed below), plaintiff must have established that there are issues of fact that demonstrate jury questions on the issue of *intentional* deprivation of civil rights by specifically named individual defendants, rather than conduct which is negligent or “grossly negligent.” Plaintiff nowhere came close to creating an issue of fact on this point.

#### **4. Defendants Have Immunity Against The § 1983 Claims**

The individual defendants have absolute or qualified immunity against plaintiff's 42 U.S.C. § 1983 claims. In addition to judges, prosecutors and comparable quasi-judicial or quasi-prosecutorial persons enjoy absolute immunity. This immunity extends to the members of the DQAC and the individual responsible for the disciplinary program, for the reasons previously discussed in this motion. *See Jones v. State*, 170 Wn.2d 338, 242 P. 3d 825 (2010) (Executive director of the State Board of Pharmacy absolutely immune from § 1983 action). *See also Hannum*, 88 Wn. App. at 881 (agency administrators absolutely immune in administrative hearing process).

Other State employees are entitled to qualified immunity, which is held to extend to all but the “clearly incompetent” officials who violate *clearly established law* that a reasonable official would have known about. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); *Elder v. Holloway*, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994); *Altshuler v. City of Seattle*, 63 Wn. App. 389, 819 P.2d 393 (1991), *review denied*, 118 Wn.2d 1023, 827 P.2d 1392 (1992).

Qualified immunity is intended to give officials flexibility to act in areas where the law is unclear without having their judgments being clouded by fears of being sued. *Anderson*, 483 U.S. at 645, 107 S. Ct. at 3042. Mistaken judgments and “ample room for reasonable error” are permitted under this standard as qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law . . . . [I]f officers of reasonable competence could disagree on [the relevant] issue, immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986).

There are two steps to the qualified immunity inquiry. First, a plaintiff must show that the challenged conduct clearly caused a deprivation of a federal right. *Schmitt v. Langenour*, 162 Wn. App. 397, P.3d 1235 (2011). If this showing is made, then the plaintiff next must

show that the right was clearly established in a particularized way at the time the challenged conduct occurred. This second step asks “whether the defendant could . . . have reasonably but erroneously believed that his or her conduct did not violate the plaintiff’s rights.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (2001). This second inquiry into whether the allegedly deprived right was “clearly established” requires a court to decide “whether the contours of the right were already delineated with sufficient clarity to make a reasonable person in the defendant’s circumstances aware that what he was doing violated that right.” *Devereaux*, 263 F.3d at 1074.

A plaintiff must establish more than broad legal truisms. Anderson, 483 U.S. at 639-640. It is not enough that the emergence of the right could be predicted from cases dealing with analogous issues, or that the right lay in the line of natural evolution from accepted principles, or that stated with sufficient generality, the right could be said to exist already.

*Devereaux*, 263 F.3d at 1074.

Plaintiff cites no case which even remotely shows that there was a “clearly established right” grounded in due process pertaining to a temporary practice restriction, as here, as opposed to license suspension or revocation.

In the context of Department of Health investigators, our supreme court has recently held that such investigators are entitled to qualified

immunity against § 1983 claims unless the investigators willfully *fabricated evidence* which would lead the disciplinary board to find an emergency summary action against the licensee without a pre-deprivation hearing. *Jones*, 170 Wn.2d at 338. Here, plaintiff neither alleges, nor can he show, that the defendant investigator *fabricated evidence*, as opposed to conducting an allegedly negligent or incomplete investigation. Only such willful fabrication could obviate qualified immunity.

Plaintiff's attempt to suggest that the *Jones* case is supportive of his position is completely unavailing. Appellant's Br. at 23-25. For one thing, it ultimately turns upon the argument, already discussed at length, that the investigator in this case, Ms. Miller-Smith, willfully concealed material evidence from the DQAC by withholding facts exculpatory to Dr. Janaszak. As has been previously shown, this is flatly untrue, as any review of the voluminous and detailed recounting of Dr. Janaszak's response to the complaints, and those of his witnesses which were placed before the Commission will show. Indeed, it is on this canard that plaintiff places his entire dependence in attempting to suggest that the investigator fabricated evidence, or fabricated an emergency. It collapses upon a review of the record before the trial court.

In addition, plaintiff in his appellant's brief for the first time goes so far as to state, without a scintilla of evidence, that the Attorney

General's office "intentionally skewed" the information before the DQAC—even though the plaintiff never named the Assistant Attorney General involved as an individual § 1983 defendant. *See* Appellant's Br. at 22-23

Furthermore, an agency investigator who did not personally participate in the filing of charges or in the summary agency action cannot be liable under 42 U.S.C. § 1983. This applies here to defendant Ms. Miller-Smith. *See Hannum*, 88 Wn. App. at 881 (Department of Licensing and director and administrator of DOL).

Accordingly, all of plaintiff's 42 U.S.C. § 1983 claims were rightly dismissed as a matter of law.

**E. There Is No Actionable Defamation Claim For A Release Of Information Of Official State Action**

Plaintiff's defamation claim concerns the content of the press release put upon the DOH website regarding the placement of the summary practice restriction on Dr. Janaszak. It appears that it is his contention that the first sentence of the posting is defamatory, because it says that his license has been restricted "for having sexual relationships with patients," and that, in fact, the state of the facts was that he was *alleged* to have had such relationships, and that the notice falsely states this as a matter of fact, rather than allegation.

Plaintiff ignores the fact that the third sentence of the press release states the following: “The statement of charges alleges Janaszak had sexual relationships with two patients.” The release continues with such language as “the charges say” and “is also accused.” The posting then directs any readers to the actual case documents.

To make a prima facie case of defamation, a plaintiff must prove “falsity, an unprivileged communication, fault, and damages.” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002). *See also LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989); *Guntheroth v. Rodaway*, 107 Wn.2d 170, 175, 727 P.2d 982 (1986); *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 102 S. Ct. 2942, 73 L. Ed. 2d 1339 (1982).

Truth is an absolute defense. The prima facie case must consist of specific, material facts rather than conclusory statements that would allow a jury to find that each element of defamation exists. *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Guntheroth*, 107 Wn.2d at 175. Statements which are “substantially true” are not false. *Mark*, 96 Wn.2d at 473. Stated another way, statements which are merely inaccurate are not actionable. *Id.* Statements made in a highly critical way are insufficient for defamation. *Margoles v. Hubbart*, 111 Wn.2d 195, 760 P. 2d 324 (1988).

It is State's position that the defamation claim necessarily fails for lack of falsity, and privilege, at the very least.

For falsity, the plaintiff must base his defamation claim on a statement that is "provably false." *Schmalenberg v. Tacoma News*, 87 Wn. App. 579, 590-91, 943 P.2d 350 (1997). The burden of proving falsity rests on the plaintiff. *Schmalenberg*, 87 Wn. App. at 591.

Here, the statement in the press release is unquestionably true, and most certainly it is not "provably false." It states exactly what happened regarding the decision of the DQAC pursuant to its statutory authority and purposes, and it also makes fully clear that the restriction is based upon *allegations* by two patients, and that the ultimate result will be "pending the outcome of a hearing;" in other words, the allegations will be subject to a hearing and the process of evidence and defense.

Secondly, the press release process is privileged, as being within the scope of the "official duty privilege" against claims of defamation against public officials acting within the scope of their duties. This privilege and the basis for it in Washington was set out in detail in *Liberty Bank v. Henderson*, 75 Wn. App. 546, 878 P.2d 1259 (1994), a case involving allegedly defamatory statements made by the Washington Supervisor of Banking:

The common law has long extended an absolute privilege from liability for defamation to executive officials properly discharging an official duty. *See generally* W. Page Keeton, et al., *Prosser and Keeton on Torts* § 114, at 821-23 (5th ed. 1984); Restatement (Second) of Torts § 591 (1977). The privilege serves the public policy of promoting freedom in the exercise of official duties without the hindrance of lawsuits based on acts done in the course of such duties; such lawsuits would consume time and energy that would otherwise be devoted to governmental service, and the threat of which might inhibit the vigorous administration of governmental policy. Restatement, *supra*, § 591, comment a; *Barr v. Matteo*, 360 U.S. 564, 571, 79 S.Ct. 1335, 1339, 3 L.Ed.2d 1434 (1959). Because the privilege is absolute, no action can be maintained against an officer who comes within its scope, irrespective of his or her purpose in making the publication. Restatement, *supra*, § 591, comment d; *Prosser and Keeton on Torts, supra*, at 816 (where considerations of policy require absolute immunity, privilege applies without regard to purpose, motive, or reasonableness of conduct); *see also* *Dugas v. Harahan*, 978 F.2d 193, 196 (5th Cir.1992), cert. denied, 510 U.S. 813, 114 S.Ct. 60, 126 L.Ed.2d 29 (1993) (“[t]he privilege attaches to communications by public officials no matter how false, malicious, or badly motivated the communication may be”).

The Restatement defines the scope of this privilege as follows:

The absolute privilege . . . exists only when the officer . . . publishes the defamatory matter in the performance of his official duties, or within the scope of his line of duty. This does not mean that the publication must be one that the officer in question is required to make . . . It is enough that the publication is one that the officer is authorized to make in his capacity as an officer. Thus the head of a federal or state department may be authorized to issue press releases giving the public information concerning the conduct of the department, or events of public interest that have occurred in connection with it; and if he is so authorized he is within

the scope of his official duties when he gives the information to the press. Restatement, *supra*, § 591, comment f.

*Liberty Bank*, 75 Wn. App. at 562-3; *see also Gold Seal Chinchillas v. State*, 69 Wn.2d 828, 420 P.2d 698 (1966); *Stidham v. State Dep't of Licensing*, 30 Wn. App. 611, 637 P.2d 970 (1981).

The foregoing was reiterated in *Aitken v. Reed*, 89 Wn. App. 474, 491, 949 P.2d 441 (1998) (referencing *Liberty Bank v. Henderson*, 75 Wn. App. 546, 878 P.2d 1259 (1994)):

In *Liberty Bank*, 75 Wn. App. 546, 878 P.2d 1259 (1994), Division One held that the State Supervisor of Banking was entitled to an absolute privilege for statements made within the course of his official duties. *Liberty Bank* noted that:

For an official to come within the scope of this privilege, it need only be established that the proponent is "among that class of officials absolutely privileged to publish defamatory matter", and that "the publication has more than a tenuous relation to [his or her] official capacity."

*Liberty Bank*, 75 Wn. App. at 564, 878 P.2d 1259 (quoting *Sidor v. Public Disclosure Comm'n*, 25 Wn. App. 127, 133, 607 P.2d 859 (1980)).

Here, the State Supervisor of Credit Unions is an official of the same rank as the State Supervisor of Banking in *Liberty Bank*. And Reed's statements about Aitken's operation of TAPCO had more than the tenuous relation to her official capacity. Indeed, she was performing one of her most significant duties--attempting to prevent a credit union from failing.

Where defamation and tortious interference with contract claims arise out of the same conduct, both claims are subject to the defense of privilege.

*Aitken*, 89 Wn. App. at 491; *Stidham*, 30 Wn. App. at 616.

Plaintiff cites no authority concerning his arguments as to a supposed “abuse” of an absolute public official privilege. *Momah v. Bharti*, 144 Wn. App. 731, 182 P.3d 455 (2008), cited by plaintiff, was a case which held that no privileges applied (an issue of private defamation was involved), and thus plaintiff had no burden to prove waiver. It has no application to this case. Nor does the plaintiff explain before this court his argument novel to the appeal that an unnamed “class” of DOH employees do not enjoy the privilege established in *Liberty Bank* and *Aitken*.

Accordingly, the defamation claims brought by Dr. Janaszak were properly dismissed.

**F. No Private Constitutional Damage Actions Exist Under The Washington State Constitution**

Plaintiff’s 4<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> “causes of action” are for claimed violations of various provisions of the Washington State Constitution. Suffice it to say that our courts hold that, absent statute (such as 42 U.S.C. § 1983 in regard to claimed violations of rights granted under the U.S. Constitution), there is no private action for damages for violations of the State constitution—and there are no statutes establishing these claims.

*Blinka v. Wash. State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001).

Plaintiff concedes that there are no tort claims under the Washington State Constitution. As to the theory of “injunction,” suffice it to say that the plaintiff submitted absolutely nothing in the record before the trial court supporting, either factually or legally, the proposition that it could issue any injunctions in this case. The record is completely silent on that point.

**G. All Of Plaintiff's “Negligence” Claims Were Properly Dismissed**

Plaintiff asserted three negligence claims in the Amended Complaint. The “eleventh cause of action” is for “negligent investigation,” including failure to follow its policies and procedures for investigations. The “twelfth” is for “common law negligence” (and essentially restates the “negligent investigation” claim). The “fourteenth cause of action” is for “negligent infliction of emotional distress,” claiming that plaintiff suffered compensable emotional distress as a result of the “negligent investigation.”

There is no general tort or claim in Washington law for “negligent investigation” on the part of State agencies. *Corbally v. Kennewick Sch.*

*Dist.*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999); *Stansfield v. Douglas County*, 107 Wn. App. 1, 27 P.3d 205 (2001).<sup>2</sup>

In *Stansfield*, 107 Wn. App. at 1, the plaintiff claimed that the Washington State Toxicology Lab was negligent in various ways in carrying out blood tests, with the result that he was wrongfully charged criminally with the murder of his wife and another. *Stansfield*, 107 Wn. App. at 1. The prosecution dismissed its case in the middle of the criminal trial because anomalies with the Lab testing emerged during the course of trial. *Id.* In *Stansfield*, plaintiff sued Douglas County and the State on various theories, including negligent investigation and negligent infliction of emotional distress. The court stated as follows:

The threshold determination in a claim of negligence is the existence of a duty to the plaintiff, which is a question of law. *Taylor v. Stevens County*, 111 Wash.2d 159, 163, 168, 759 P.2d 447 (1988). “In general, a claim for negligent investigation does not exist under the common law of Washington.” *Pettis v. State* 98 Wash.App. 553, 558, 990 P.2d 453 (1999). That rule recognizes the chilling effect such claims would have on investigations. *Corbally v. Kennewick Sch. Dist.*, 94 Wash.App. 736, 740, 973 P.2d 1074 (1999) (citing *Dever v. Fowler*, 63 Wash.App. 35, 45, 816 P.2d 1237, 824 P.2d 1237 (1991)).

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<sup>2</sup> Washington law recognizes a viable claim against DSHS for “negligent investigation” of child-abuse claims which result in a harmful placement of a child. This arises from a specific child-welfare statute which our court has held creates a legislative intent exception. See RCW 26.44.050; *M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 596-99, 70 P.3d 954 (2003). Moreover, State agency policies, procedures, and manuals create no actionable duties. *Joyce v. Dep’t of Corrections*, 155 Wn.2d 306, 323-24, 119 P.3d 825 (2005).

Dr. Stansfield argues that a distinction exists between negligent investigation and the allegations that the State Lab was negligent in carrying out its statutory duties. He provides no authority for this proposition.

Under RCW 68.50.107, the State Toxicology Laboratory has the duty of performing “all necessary toxicologic procedures requested by all coroners, medical examiners, and prosecuting attorneys.” Under the public duty doctrine, liability may not be imposed on the State for the negligent conduct of a public official unless the duty breached is owed to a particular individual rather than to the public as a whole. Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co., 115 Wash.2d 506, 529, 799 P.2d 250 (1990); *see also* Taggart v. State, 118 Wash.2d 195, 218, 822 P.2d 243 (1992) (“The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff”).

Recognized exceptions to the public duty doctrine include (1) the special relationship; (2) the failure to enforce; (3) the duty to prevent a third person from causing harm; and (4) the good Samaritan. Cameron v. Janssen Bros. Nurseries, Ltd., 7 F.3d 821, 825 (9th Cir.1993).

The “special relationship” exception, is a “focusing tool” used to determine whether the government owes a general duty to the public or whether that duty is focused on the plaintiff. Taylor, 111 Wash.2d at 166, 759 P.2d 447. To establish a special relationship, the plaintiff must show (1) some form of privity or direct contact between the government . . . .

In this case, Dr. Stansfield has not shown that the State Toxicology Laboratory owes him a duty that is different from the duty that it owes to the general public. Moreover, he has not offered evidence that shows the existence of a special relationship between him and the State Toxicology Laboratory, justifying an exception to the public duty doctrine. Because we conclude as a matter of law that there

was no duty to Dr. Stansfield, we affirm the superior court's summary judgment dismissal of his negligence claim.

*Stansfield*, 107 Wn. App. at 12-13 (emphasis in original).

No Washington court has ever recognized a cause of action in tort for negligent investigation in any context other than that of child abuse investigation pursuant to RCW 26.44.050. *See, e.g., Dever v. Fowler*, 63 Wn. App. 35, 44, 816 P.2d 1237 (1991); *Tyner v. State*, 141 Wn.2d 68, 77-82, 1 P.3d 1148 (2000). Third, only in limited circumstances will a court imply a cause of action for money damages based on a statutory obligation to perform an act. *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990).

To determine whether it is appropriate to imply a cause of action, courts use a three-part test:

[F]irst, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

*Bennett*, 113 Wn.2d at 920-21.

But, plaintiff can offer no analysis of this test and can supply no authority regarding the legislative intent to create a cause of action for money damages. This is because no such intent exists. The UDA was created to "assure the public of the adequacy of professional competence

and conduct in the healing arts.” RCW 18.130.010. There is no indication anywhere within the UDA that the Legislature intended to single out practitioners as a special class that was intended to be benefitted with a cause of action for money damages. The UDA was enacted to protect the public in general, not any narrow and circumscribed class. It clearly was not intended to protect dentists and other regulated professionals. *Bennett*, 113 Wn.2d at 912. Without such intent, plaintiff’s efforts to create a cause of action for negligent investigation fail.

#### **H. Remaining Claims**

##### **1. Intentional Infliction Of Emotional Distress (Outrage)**

The supreme court, adopting the *(Second) of Torts* § 46 (1977), has defined the elements of the tort of outrage or intentional infliction of emotional distress as follows: (1) extreme and outrageous conduct, (2) intentionally or recklessly inflicted, and (3) that actually results in severe emotional distress to the plaintiff. *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987). Given the statutory process under which the DQAC is required to operate, as a matter of law the plaintiff cannot establish the necessary elements.

For conduct to be “extreme and outrageous,” it must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

intolerable in a civilized community. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

It is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Phillips v. Hardwick*, 29 Wn. App. 382, 387, 628 P.2d 506 (1981). Summary judgment for the defendant is appropriate if reasonable minds could not differ on the issue. *Springer v. Rosauer*, 31 Wn. App. 418, 426, 641 P.2d 1216, *review denied*, 97 Wn.2d 1024 (1982).

Dr. Janaszak did not attempt in the Amended Complaint or subsequently to identify with any particularity who are the “intentional actors” in regard to this intentional tort. In any event, for the reasons discussed at length earlier in this brief, the defendants were acting in accordance with statutory duties and were accompanied by attendant privileges and immunities, and thus as a matter of law there can be no viable outrage claim. As a matter of law, none of the enumerated elements of the tort are present.

## **2. Intentional Interference With Business Expectancy**

Tortious interference with contractual relations or business expectancy requires a showing of:

1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;

3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant damages.

*Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992) (quoting *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992)).

Dr. Janaszak was unable to establish a single element of this tort. The “bottom line” is that the plaintiff’s claim of economic loss in this case was his claim that the torts that he alleged, and in particular, his claim of defamation, caused economic harm to his dental practice, in that patients desire to patronize the practice was adversely impacted by the summary action of the DQAC and the press release. He could make no showing that any defendant had knowledge of a specific contract or expectancy, and intentionally and by improper means or purpose interfered with it. *See also Aitken*, 89 Wn. App. at 491, where it was said:

Where defamation and tortious interference with contract claims arise out of the same conduct, both claims are subject to the defense of privilege.

This, itself, is dispositive.

Instead of supplying any evidence on any element of this tort, plaintiff filed a short declaration that his business was harmed by the publication, and that insurance companies would no longer do business

with him. CP at 351-52. But this is merely a claim of damages that would apply should he be entitled to general tort damages. Loss of business is not the same thing as intentional interference with business expectancy, which requires knowledge of a specific contract, intent to interfere with it, and improper means. Absent evidence of any of those elements, plaintiff's claim fails.

### **3. Retaliation**

Plaintiff makes assertions about a 2010 investigation, which was initiated based upon a complaint brought in February 2010 by another dental practitioner alleging sexual misconduct regarding Dr. Janaszak. Plaintiff says that DOH "sat on" that complaint, supposedly in retaliation for the filing of this lawsuit, and that this constitutes conduct "outside the scope of their duties." *See* Appellant's Br. at 12.

The main problem with this is that plaintiff has never set out the details of this complaint, what it was about, why there may have been "delays," or any facts whatsoever constituting "retaliation;" indeed, simply no facts at all. This supposed claim is left "hanging in the air," with no facts, no details, and no record to even explain it, much less support it.

## **V. CONCLUSION**

The purpose of the Dental Quality Assurance Commission (DQAC), as with the many similar State healthcare disciplinary bodies, is

to regulate the competency and quality of professional health care providers under its jurisdiction. RCW 18.32.002, 18.130.010. Here, the DQAC received and investigated serious complaints of sexual misconduct by patients against Dr. Janaszak. The sexual relationships were admitted. The fact that the complainants had been patients of Dr. Janaszak at certain times was admitted. The impropriety of sexual relationships with patients is also admitted by Dr. Janaszak. What was very much in controversy was whether or not the sexual relationships took place while the women who brought the complaints had been patients of Dr. Janaszak. They strongly asserted it, and he denied it.<sup>3</sup>

The overwhelming point is that the DQAC had a statutory mandate requiring it to authorize investigation of these complaints and to pursue disciplinary action as warranted. To protect the investigatory process, defendants are necessarily immune from tort liability in all respects. Notably, the allegations themselves were never ultimately adjudicated, and Dr. Janaszak was never exonerated from the complaints. Instead, the complainants, for personal reasons, decided not to further cooperate with the process after their depositions were initially taken in

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<sup>3</sup> No purpose would be served by a recitation here of the details of the complaints and of Dr. Janaszak's contentions, which are all set forth in the record. *See, e.g.*, CP at 191-215. The fact is that even Dr. Janaszak's defense on that point in the disciplinary proceedings relied on his own very ambiguous memory and "close cutting" of the chronologies, as well as considerable casuistry on the question of "patient status."

the disciplinary proceedings, and the DQAC as a practical matter could thus no longer proceed. Dr. Janaszak has procedural protections under the Uniform Disciplinary Act. He had protections in the administrative hearing process. But what he does not have are *claims for money damages* for what he contends are violations of statutes and procedures.

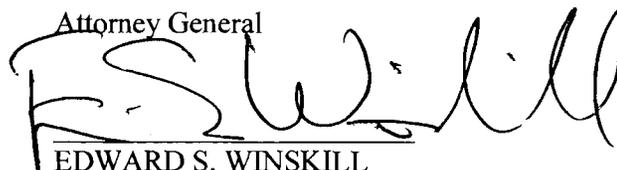
Plaintiff's entire lawsuit is misconceived. There are no grounds for any of his tort claims under state law, and it runs directly against privileges and immunities which are essential to governing and to the pursuit of the public's business by public officials. None of his allegations come close to satisfying federal civil rights law requirements, or overcoming the privileges applying there, either. Health-provider disciplinary bodies and their personnel are rightly free of the threat of tort liability as they go about their essential business in the public interest.

And, Dr. Janaszak, in this lawsuit, failed the most basic test of all—he neither developed nor provided facts to support any of his claims.

For these reasons, the Order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this <sup>9<sup>th</sup></sup> day of February, 2012.

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# APPENDIX

RCW 18.32.002

RCW 18.32.0351

RCW 18.32.0353

RCW 18.32.0357

RCW 18.32.039

RCW 18.130

RCW 18.130.010

RCW 18.130.100

RCW 18.130.110

RCW 18.130.160

RCW 18.130.300

RCW 26.44.050

## **Rules**

CR 56

CR 56(e)

RCW 18.32.002  
Findings — Purpose.

The legislature finds that the health and well-being of the people of this state are of paramount importance.

The legislature further finds that the conduct of members of the dental profession licensed to practice dentistry in this state plays a vital role in preserving the health and well-being of the people of the state.

The legislature further finds that requiring continuing dental education for all licensed dentists in the state is an important component of providing high quality dentistry for the people of this state.

The legislature further finds that there is no effective means of handling disciplinary proceedings against members of the dental profession licensed in this state when such proceedings are necessary for the protection of the public health.

Therefore, the legislature declares its intention to exercise the police power of the state to protect the public health, to promote the welfare of the state, and to provide a commission to act as a disciplinary and regulatory body for the members of the dental profession licensed to practice dentistry in this state.

It is the purpose of the commission established in RCW 18.32.0351 to regulate the competency and quality of professional health care providers under its jurisdiction by establishing, monitoring, and enforcing qualifications for licensure, continuing education, consistent standards of practice, continuing competency mechanisms, and discipline. Rules, policies, and procedures developed by the commission must promote the delivery of quality health care to the residents of the state.

[1999 c 364 § 1; 1994 sp.s. c 9 § 201.]

RCW 18.32.0351

Commission established — Membership.

The Washington state dental quality assurance commission is established, consisting of sixteen members each appointed by the governor to a four-year term. No member may serve more than two consecutive full terms. In appointing the initial members of the commission, it is the intent of the legislature that, to the extent possible, members of the previous boards and committees regulating these professions be appointed to the commission. Members of the commission hold office until their successors are appointed. The governor may appoint members of the initial commission to staggered terms of from one to four years. Thereafter, all members shall be appointed to full four-year terms. Twelve members of the commission must be dentists, two members must be expanded function dental auxiliaries licensed under chapter 18.260 RCW, and two members must be public members.

[2007 c 269 § 16; 1994 sp.s. c 9 § 204.]

Notes:

**Effective date -- 2007 c 269 § 16:** "Section 16 of this act takes effect July 1, 2009." [2007 c 269 § 20.]

**Application -- Implementation -- 2007 c 269:** See RCW 18.260.900 and 18.260.901.

RCW 18.32.0353

Commission — Removal of member — Order of removal — Vacancy.

The governor may remove a member of the commission for neglect of duty, misconduct, or malfeasance or misfeasance in office. Whenever the governor is satisfied that a member of the commission has been guilty of neglect of duty, misconduct, or malfeasance or misfeasance in office, the governor shall file with the secretary of state a statement of the causes for and the order of removal from office, and the secretary shall forthwith send a certified copy of the order of removal and statement of causes by certified mail to the last known post office address of the member. If a vacancy occurs on the commission, the governor shall appoint a replacement to fill the remainder of the unexpired term.

[1994 sp.s. c 9 § 205.]

RCW 18.32.0357

Commission — Duties and powers — Attorney general to advise, represent.

The commission shall elect officers each year. Meetings of the commission are open to the public, except the commission may hold executive sessions to the extent permitted by chapter 42.30 RCW. The secretary of health shall furnish such secretarial, clerical, and other assistance as the commission may require.

A majority of the commission members appointed and serving constitutes a quorum for the transaction of commission business. The affirmative vote of a majority of a quorum of the commission is required to carry a motion or resolution, to adopt a rule, or to pass a measure.

The commission may appoint members of panels consisting of not less than three members. A quorum for transaction of any business shall be a minimum of three members. A majority vote of a quorum of the panel is required to transact business delegated to it by the commission.

The members of the commission are immune from suit in an action, civil or criminal, based upon its disciplinary proceedings or other official acts performed in good faith as members of the commission.

The commission may, whenever the workload of the commission requires, request that the secretary appoint pro tempore members. While serving as members pro tempore persons have all the powers, duties, and immunities, and are entitled to the emoluments, including travel expenses, of the commission.

The commission shall prepare or determine the nature of the examinations for applicants to practice dentistry.

The commission shall establish continuing dental education requirements.

The attorney general shall advise the commission and represent it in all legal proceedings.

[1999 c 364 § 2; 1994 sp.s. c 9 § 207.]

RCW 18.32.039

Application of uniform disciplinary act.

The uniform disciplinary act, chapter 18.130 RCW, governs unlicensed practice, the issuance and denial of licenses, and the discipline of licensees under this chapter.

[1987 c 150 § 17; 1986 c 259 § 34.]

Notes:

**Severability -- 1987 c 150:** See RCW 18.122.901.

**Severability -- 1986 c 259:** See note following RCW 18.130.010.

RCW 18.130.010  
Intent.

It is the intent of the legislature to strengthen and consolidate disciplinary and licensure procedures for the licensed health and health-related professions and businesses by providing a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and conduct in the healing arts.

It is also the intent of the legislature that all health and health-related professions newly credentialed by the state come under the Uniform Disciplinary Act.

Further, the legislature declares that the addition of public members on all health care commissions and boards can give both the state and the public, which it has a statutory responsibility to protect, assurances of accountability and confidence in the various practices of health care.

[1994 sp.s. c 9 § 601; 1991 c 332 § 1; 1986 c 259 § 1; 1984 c 279 § 1.]

Notes:

**Severability -- Headings and captions not law -- Effective date -- 1994 sp.s. c 9:** See RCW 18.79.900 through 18.79.902.

**Application to scope of practice -- 1991 c 332:** "Nothing in sections 1 through 39 of this act is intended to change the scope of practice of any health care profession referred to in sections 1 through 39 of this act." [1991 c 332 § 46.]

**Captions not law -- 1991 c 332:** "Section captions and part headings as used in this act constitute no part of the law." [1991 c 332 § 43.]

**Severability -- 1986 c 259:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1986 c 259 § 152.]

RCW 18.130.100

Hearings — Adjudicative proceedings under chapter 34.05 RCW.

The procedures governing adjudicative proceedings before agencies under chapter 34.05 RCW, the Administrative Procedure Act, govern all hearings before the disciplining authority. The disciplining authority has, in addition to the powers and duties set forth in this chapter, all of the powers and duties under chapter 34.05 RCW, which include, without limitation, all powers relating to the administration of oaths, the receipt of evidence, the issuance and enforcing of subpoenas, and the taking of depositions.

[1989 c 175 § 69; 1984 c 279 § 10.]

Notes:

**Effective date -- 1989 c 175:** See note following RCW 34.05.010.

RCW 18.130.110

Findings of fact — Order — Report.

(1) In the event of a finding of unprofessional conduct, the disciplining authority shall prepare and serve findings of fact and an order as provided in chapter 34.05 RCW, the Administrative Procedure Act. If the license holder or applicant is found to have not committed unprofessional conduct, the disciplining authority shall forthwith prepare and serve findings of fact and an order of dismissal of the charges, including public exoneration of the licensee or applicant. The findings of fact and order shall be retained by the disciplining authority as a permanent record.

(2) The disciplining authority shall report the issuance of statements of charges and final orders in cases processed by the disciplining authority to:

- (a) The person or agency who brought to the disciplining authority's attention information which resulted in the initiation of the case;
- (b) Appropriate organizations, public or private, which serve the professions;
- (c) The public. Notification of the public shall include press releases to appropriate local news media and the major news wire services; and
- (d) Counterpart licensing boards in other states, or associations of state licensing boards.

(3) This section shall not be construed to require the reporting of any information which is exempt from public disclosure under chapter 42.56 RCW.

[2005 c 274 § 232; 1989 c 175 § 70; 1984 c 279 § 11.]

Notes:

**Part headings not law -- Effective date--2005 c 274:** See RCW 42.56.901 and 42.56.902.

**Effective date -- 1989 c 175:** See note following RCW 34.05.010.

Upon a finding, after hearing, that a license holder has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority shall issue an order including sanctions adopted in accordance with the schedule adopted under RCW 18.130.390 giving proper consideration to any prior findings of fact under RCW 18.130.110, any stipulations to informal disposition under RCW 18.130.172, and any action taken by other in-state or out-of-state disciplining authorities. The order must provide for one or any combination of the following, as directed by the schedule:

- (1) Revocation of the license;
- (2) Suspension of the license for a fixed or indefinite term;
- (3) Restriction or limitation of the practice;
- (4) Requiring the satisfactory completion of a specific program of remedial education or treatment;
- (5) The monitoring of the practice by a supervisor approved by the disciplining authority;
- (6) Censure or reprimand;
- (7) Compliance with conditions of probation for a designated period of time;
- (8) Payment of a fine for each violation of this chapter, not to exceed five thousand dollars per violation. Funds received shall be placed in the health professions account;
- (9) Denial of the license request;
- (10) Corrective action;
- (11) Refund of fees billed to and collected from the consumer;
- (12) A surrender of the practitioner's license in lieu of other sanctions, which must be reported to the federal data bank.

Any of the actions under this section may be totally or partly stayed by the disciplining authority. Safeguarding the public's health and safety is the paramount responsibility of every disciplining authority. In determining what action is appropriate, the disciplining authority must consider the schedule adopted under RCW 18.130.390. Where the schedule allows flexibility in determining the appropriate sanction, the disciplining authority must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the disciplining authority consider and include in the order requirements designed to rehabilitate the license holder. All costs associated with compliance with orders issued under this section are the obligation of the license holder. The disciplining authority may order permanent revocation of a license if it finds that the license holder can never be rehabilitated or can never regain the ability to practice with reasonable skill and safety.

Surrender or permanent revocation of a license under this section is not subject to a petition for reinstatement under RCW 18.130.150.

The disciplining authority may determine that a case presents unique circumstances that the schedule adopted under RCW 18.130.390 does not adequately address. The disciplining authority may deviate from the schedule adopted under RCW 18.130.390 when selecting appropriate sanctions, but the disciplining authority must issue a written explanation of the basis for not following the schedule.

The license holder may enter into a stipulated disposition of charges that includes one or more of the sanctions of this section, but only after a statement of charges has been issued and the license holder has been afforded the opportunity for a hearing and has elected on the record to forego such a hearing. The stipulation shall either contain one or more specific findings of unprofessional conduct or inability to practice, or a statement by the license holder acknowledging that evidence is sufficient to justify one or more specified findings of unprofessional conduct or inability to practice. The stipulation entered into pursuant to this subsection shall be considered formal disciplinary action for all purposes.

[2008 c 134 § 10. Prior: 2006 c 99 § 6; 2006 c 8 § 104; 2001 c 195 § 1; 1993 c 367 § 6; 1986 c 259 § 8; 1984 c 279 § 16.]

Notes:

**Finding -- Intent -- Severability -- 2008 c 134:** See notes following RCW 18.130.020.

**Findings -- Intent -- Part headings and subheadings not law -- Severability -- 2006 c 8:** See notes following RCW 5.64.010.

**Severability -- 1986 c 259:** See note following RCW 18.130.010.

RCW 18.130.300  
Immunity from liability.

(1) The secretary, members of the boards or commissions, or individuals acting on their behalf are immune from suit in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties.

(2) A voluntary substance abuse monitoring program or an impaired practitioner program approved by a disciplining authority, or individuals acting on their behalf, are immune from suit in a civil action based on any disciplinary proceedings or other official acts performed in the course of their duties.

[1998 c 132 § 11; 1994 sp.s. c 9 § 605; 1993 c 367 § 10; 1984 c 279 § 21.]

Notes:

**Finding -- Intent -- Severability -- 1998 c 132:** See notes following RCW 18.71.0195.

**Severability -- Headings and captions not law -- Effective date -- 1994 sp.s. c 9:** See RCW 18.79.900 through 18.79.902.

RCW 26.44.050

Abuse or neglect of child — Duty of law enforcement agency or department of social and health services — Taking child into custody without court order, when.

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

[1999 c 176 § 33. Prior: 1987 c 450 § 7; 1987 c 206 § 5; 1984 c 97 § 5; 1981 c 164 § 3; 1977 ex.s. c 291 § 51; 1977 ex.s. c 80 § 28; 1975 1st ex.s. c 217 § 5; 1971 ex.s. c 302 § 15; 1969 ex.s. c 35 § 5; 1965 c 13 § 5.]

Notes:

**Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176:** See notes following RCW 74.34.005.

**Severability -- 1984 c 97:** See RCW 74.34.900.

**Effective dates -- Severability -- 1977 ex.s. c 291:** See notes following RCW 13.04.005.

**Purpose -- Intent -- Severability -- 1977 ex.s. c 80:** See notes following RCW 4.16.190.

**Severability -- 1971 ex.s. c 302:** See note following RCW 9.41.010.

RULE 56  
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to

permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

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