NO. 1039417

SUPREME COURT OF THE STATE OF WASHINGTON

Melinda Johnson,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF HEALTH,

Respondent.

STATE'S RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Review is not warranted in this case, in which the Court of Appeals held that pursuant to the Uniform Disciplinary Act (UDA) the State of Washington and Department of Health (Department) are statutorily immune to claims by Petitioner Melinda Johnson arising from disciplinary proceedings against her. *See* Opinion (Op.) at 11-12. The decision below joins the consistent reasoning of Divisions I and II applying statutory immunity under the UDA in similar circumstances. *See Hiesterman v. Dep't of Health*, 24 Wn. App. 2d 907, 524 P.3d 693 (2023), *review denied,* 1 Wn.3d 1020, 532 P.3d 161 (2023); *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013). This Court has already declined review on the most recent case and should likewise decline review here.

In establishing the UDA, the Legislature granted the Department the authority to oversee licensing, competency, and quality of health care delivered by health care professionals. RCW 18.130. Its intent was "to assure the public of the adequacy of professional competence and conduct in the healing arts ...."

RCW 18.130.010. To protect the integrity of the disciplinary process, the Legislature provided absolute immunity *from suit* "in any action, civil or criminal, based on any disciplinary proceedings or other official acts performed in the course of their duties." RCW 18.130.300(1). Such protection extends to the State and Department, guarantees the independence of the Department, and allows it "to protect the adequacy of professional competence and conduct without fear of suit." *Janaszak*, 173 Wn. App. at 719. *See also Hiesterman*, 24 Wn. App. 2d at 915 (following *Janaszak* and holding RCW 18.130.300(1) immunity extends to statutory-required reporting.) *See also* Op. at 10.

Here, the Court of Appeals properly adhered to principles of statutory interpretation and governing precedent in determining that the Department is entitled to statutory immunity. Review of this straightforward issue is not warranted.

Further, to the extent Johnson seeks to raise constitutional issues, she did not plead a violation of federal constitutional rights under 42 U.S.C. § 1983, nor would one be actionable against the

State or the Department under that statute. In addition, alleged violations of state constitutional rights are not actionable for money damages in tort.[1] The Court of Appeals properly declined to consider her alleged constitutional violations and discovery issues because Johnson failed to advance any argument that the trial court committed a manifest error of constitutional dimensions. *See* Op. at 2. While Johnson relies solely on RAP 13.4(3) and (4), *see* Petition at 1-2, *none* of the grounds set forth in RAP 13.4(b) necessitate this Court's review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court of Appeals properly held that the immunity provided by RCW 18.130.300(1) bars Johnson's claims against the Department because the claims stem entirely from a disciplinary proceeding and other official acts, including the mandatory reporting of a settlement agreement reached between the parties.

[1] *Janaszak*, 173 Wn. App. at 723–24.

2. Whether the Court of Appeals properly declined to consider matters Johnson did not raise before the trial court when she failed to demonstrate a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3).

3. Whether the Court of Appeals properly declined to consider Johnson's "withdrawn formal Statement of Charges," Petition at 2, when that document, which was included in Johnson's Appendix to Johnson's Opening Brief to Division III was not part of the record below.

III. COUNTERSTATEMENT OF THE CASE

A. The Department Oversees the Quality of Health Care in Washington

Pursuant to the UDA, the Department oversees the licensing, competency, and quality of health care delivered by healthcare professionals in Washington to protect public health and safety. *See generally* RCW 18.130. The UDA encompasses all "health and health-related professions" under the Department's authority, including licensed independent clinical social workers. RCW 18.130.040(2)(a)(x); RCW 18.225.080.

The Legislature intended to provide "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." RCW 18.130.010.

The UDA provides the Department with broad authority to credential, discipline, and revoke the licensure of health professionals. RCW 18.130.055; RCW 18.130.050(2), (7); RCW 18.130.050(8)(a)-(b). To achieve this mission without fear of reprisal, since 1994, the Legislature has granted absolute immunity to the "secretary, members of the boards or commissions, or individuals acting on their behalf" from all suits – whether civil or criminal – stemming from disciplinary proceedings or other official acts. RCW 18.130.300(1); *see also* Laws of 1994 1st Spec. Sess., ch. 9, § 605. Since 2013, the Court of Appeals has recognized that statutory immunity also extends to the State and Department. *Janaszak*, 173 Wn. App. at 719.

1. The Department's statutory reporting requirements under the UDA

Mindful of the State's responsibility to protect the public and assure "accountability and confidence in the various practices of health care," the UDA includes mandatory reporting requirements. RCW 18.130.010. Specifically, the Legislature mandated that the Department report to the public the issuance of statements of charges and final orders by means of "press releases to appropriate local news media and the major news wire services." RCW 18.130.110(2)(c).

The Department is also required to report the same information to the Healthcare Integrity and Protection Data Bank ("Integrity Databank"), which then forwards the information to the National Practitioner Data Bank ("Practitioner Databank"), a database operated by the U.S. Department of Health and Human Services. RCW 18.130.110(2)(b). *See also* 42 U.S.C. §§ 1396a(a)(49), 1396r-2, and 11132; 45 C.F.R. §§ 60.8-.94. Prior to 2013, the Department would also report all Stipulations to Informal Disposition to the Integrity Databank. CP 1418.

In 2013, Congress combined the information from both databanks. CP 1418, 1422. The Department has a computer system that facilitates the entry of data to the Practitioner Databank. CP 1418. The information reported to the Practitioner Databank is not generally available to the public; rather, it is confidential and only released as allowed by federal law. 42 U.S.C. § 11137(b)(1).

2. The disciplinary process under the UDA

Generally, an investigation under the UDA begins with a complaint of unprofessional conduct. RCW 18.130.080(1)(a). For licensed professionals who are not subject to board supervision – such as licensed independent clinical social workers – the Department assigns complaints to a Case Management Team (Team) for review. CP 1712. A Team is comprised of Department employees including a case manager, legal representative, investigator, and executive director or program representative for the relevant profession. CP 1712.

The Team receives and assesses complaints, determining whether to investigate allegations or close the complaint without an investigation. CP 1712. If investigated, the Team reviews the allegations and determines if the evidence warrants an enforcement action through disciplinary proceedings. CP 1712.

Enforcement actions can include a notice of correction for minor violations; a Stipulation to Informal Disposition (Stipulation) for conduct that does not require suspension or revocation; or a Statement of Charges when a formal action is necessary to achieve the sanctions or is warranted due to the severity of the violation. CP 1712-13; RCW 18.130.098; RCW 18.130.160(12); RCW 18.130.172.

Stipulations include final and binding licensing sanctions in lieu of formal findings made by a judge during a hearing. CP 759. A Stipulation effectively dismisses the original complaint without an admission or finding of wrongdoing and precludes any further disciplinary action. RCW 18.130.172(2), (4).

If the Team determines that a Statement of Charges is necessary, the case is transferred to the Department's Office of Investigative and Legal Services. CP 1712. The Statement of Charges is the legal document that begins a formal enforcement action under the UDA. WAC 246-10-102(8). The Department is required to publicly report any Statement of Charges via a press release. RCW 18.130.110(2)(c). After a Statement of Charges is authorized, an assistant attorney general is assigned to prosecute the case in a disciplinary hearing before a health law judge. CP 1713. The parties may settle a case after a Statement of Charges has been filed and the respondent requests a hearing. RCW 18.130.098(1).

If a case is resolved via a Stipulation, the health law judge signs the Stipulation and enters it into the record. CP 1713. Stipulations become "subject to public disclosure on the same basis and to the same extent as other records of the [Department]." RCW 18.130.172(4). The Department must also report the Stipulation to the Integrity Databank. CP 1418. Based

on the type of report, the Integrity Databank then reports to the Practitioner Databank. CP 1418. Once a respondent satisfies the conditions of a Stipulation, the Department submits a second report to the Integrity Databank indicating that the Stipulation's terms have been completed. CP 663.

B. The Department Received a Complaint about Johnson and Opened an Investigation

In the early 2000s, Johnson practiced as a licensed social worker. CP 4. During the period 2002 to 2005, she worked with a family involved in custody proceedings in Benton County. CP 260.

In October 2005, the Department received a complaint from a parent of one of the children with whom Johnson was working alleging unprofessional conduct. CP 1599. Specifically, the complaint alleged Johnson had (1) made a medical diagnosis that the child was "high functioning on the spectrum . . . that includes autism" without performing the necessary formal testing to make such a diagnosis, and (2) submitted a report to the court alleging that one of the parents exhibited signs of

"Munchausen by Proxy" and "Parental Alienation" absent an individual evaluation and full assessment of the parent. CP 276. The Team reviewed the allegations and determined that an investigation was warranted. CP 221.

After the investigation, the Team determined an enforcement action was necessary and referred the case to its attorney to file a Statement of Charges. CP 1636. In September 2008, the Department filed a Statement of Charges against Johnson for allegedly committing unprofessional conduct. CP 1593. The Statement of Charges was posted to the website and reported to the data banks, as required by law.

Near this time, MHN – one of the insurance companies that contracted with Johnson – dropped her contract, after the Statement of Charges was posted but before she entered the Stipulation. CP 1615. Johnson, however, is not sure why MHN dropped her contract. CP 1615. The insurance carrier Tri-Care also dropped her without explanation. CP 1618. Johnson was never specifically aware of anyone accessing information about

her as a practitioner from the website or the databanks either before or after she entered the Stipulation. CP 1617. She also lost being a network provider with Aetna and First Choice, was dropped by the Children's Administration, and, for a period, the Department of Developmental Disabilities told Johnson she could not work with vulnerable populations. CP 1620.

C. Upon Advice of Counsel, Johnson Waived Her Right to a Formal Disciplinary Action

Johnson contested the allegations in the Statement of Charges and hired an attorney to represent her for the administrative proceedings. CP 1233. In November 2009, the Department proposed an informal disposition that reduced the Statement of Charges to a Statement of Allegations & Summary of Evidence and outlined the proposed agreement in a Stipulation pursuant to RCW 18.130.172(2). CP 725. RCW 18.130.172(4) requires that Stipulations are subject to public disclosure.

As required by RCW 18.130.172, the Stipulation contained a statement that it should not be construed as a finding of either unprofessional conduct or inability to practice. CP 1605.

It also stated, "Respondent [Johnson] acknowledges that a finding of unprofessional conduct or inability to practice based on the above allegations, if proven, would constitute grounds for discipline[.]" CP 1605. The Stipulation further set forth Johnson's agreement "that any sanction as set forth in [certain provisions of the UDA] may be imposed as part of this stipulation[.]" CP 1605.

The agreed-to sanctions included a two-year monitoring period that entailed clinical oversight by a qualified professional approved by the Department. CP 1607. That professional would monitor Johnson's ability to avoid conflicts of interest and maintain professional boundaries, would meet with Johnson monthly, and would provide quarterly reports to the Department. CP 1608. Similar conditions applied to Johnson's work on forensic and/or expert consulting work in custody cases. CP 1608. The Stipulation did not impact any other area of Johnson's practice. CP 1608, 1609. Johnson was also required to complete either six "quarter credit hours" of college courses in

the areas of Forensic and Clinical Professional Boundaries and Ethics, or ten "clock hours" of professional continuing education approved by the Department. CP 1609.

Johnson and her attorney reviewed, signed, and returned both the Statement of Allegations & Summary of Evidence and the Stipulation. CP 1609. The Stipulation included express language that it would "be reported to the Health Integrity and Protection Databank (45 C.F.R. Pt. 61) and elsewhere as required by law." CP 1605. Further, the Stipulation noted that "[i]t is a public document and will be placed on the Department of Health's website and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW)." CP 1605.

The judge signed and entered both documents into the record and struck the scheduled administrative hearing. CP 1611.

D. As Required by Statute *and* Expressly Outlined in the Stipulation, the Department Reported the Settlement and Johnson Completed the Terms of the Settlement

Stipulations must be reported to the Integrity Databank within 30 days. CP 662. Accordingly, after the parties settled the

adjudicative proceeding, the Department reported the Stipulation to the Integrity Databank. CP 1012. Johnson complied with and completed the terms of the Stipulation. In November 2011, the Department submitted a "revision to action" to the Integrity Databank to reflect that Johnson was released from the Stipulation. CP 663.

E. Johnson Sued the Department

Approximately a year after Johnson completed the agreed-to sanctions, she filed suit arising out of the Department's statutorily required reporting of the settlement. CP 1. Johnson's complaint asserted claims for declaratory judgment, breach of contract, negligence, negligent infliction of emotional distress, defamation, wrongful interference with a business expectancy, and intentional infliction of emotional distress. CP 7-8. Importantly, Johnson did not bring an action for any alleged violation of her constitutional rights under 42 U.S.C. § 1983 or

state law. CP 1-11.[2] The Department denied liability and asserted absolute statutory and quasi-judicial immunity as affirmative defenses. CP 638.

F. Trial Court Dismissed Johnson's Claims

1. The parties filed cross-motions for summary judgment

In November 2013, the parties filed cross-motions for summary judgment. CP 641, 684. In support of its motion, the State argued that the Department had absolute immunity under the UDA for disciplinary proceedings and official acts, citing *Janaszak's* holding that the statutory immunity in RCW 18.130.300(1) applied not just to individuals, but to the Department as well. CP 648. Alternatively, the State argued that Johnson failed to state an essential element of each of her claims. CP 652. The court denied Johnson's summary judgment motion and granted the State's motion in part, dismissing Johnson's

[2] In her Complaint, Johnson "reserve[d] the right to add a claim" under 42 U.S.C. § 1983, but she never did so. *See* CP 8, ¶ 34.

intentional infliction of emotional distress claim. CP 372. Thereafter, the parties continued discovery.

2. Both parties filed second motions for summary judgment

Based on that additional discovery, including Johnson's deposition, the State filed a second motion for summary judgment. CP 376. The Department renewed its argument that it was absolutely immune for official acts under *Janaszak*, and that such immunity extended to the Department's release of information in public records and statutory-required reports to national databanks. CP 801.

Johnson's counsel filed a motion to compel discovery related to case files it subpoenaed from witnesses scheduled for depositions. CP 87, 971-73. The trial court denied the State's motion for summary judgment in its entirety, but did not address the motion to compel. CP 1131. The State sought discretionary review. CP 1129. This Court denied discretionary review. CP 1129, 89.

Five months later, Johnson filed a second motion for summary judgment on the issue of whether the complainant to the administrative proceedings had been Johnson's patient. CP 1140. This same issue was litigated by Johnson's counsel in the administrative proceedings. CP 1349. The administrative health law judge denied the motion a day before the parties entered the Stipulation. CP 1354. Johnson's attempt to relitigate the issue in her tort case failed. The trial court denied the motion, ruling that the statutory language did not preclude the complainant from being a patient. CP 1503.

3. Following the decision in *Hiesterman*, the State filed a third motion for summary judgment

The State's final motion for summary judgment was prompted by Division II's decision in *Hiesterman* that adopted the reasoning from Division I's decision in *Janaszak*. *Hiesterman*, 24 Wn. App. 2d at 915 ("We conclude that *Janaszak* was correctly decided."). CP 1568-88. As relevant here, the court in *Hiesterman* held that the Department was immune from a physician's tort suit that was based on the Department's

reporting activities. 24 Wn. App. 2d at 918. Johnson did not raise constitutional claims or discovery disputes in response to the State's motion for summary judgment or by filing her own counter summary judgment. *See* CP 1716-18, 186-205.

The trial court granted the State's motion and dismissed Johnson's remaining claims. CP 380. It found the Department's conduct was "in connection with . . . official proceedings" and thus the statutory immunity applied. RP 40.[3] The court did not rule on the merits of specific claims, instead ruling that statutory immunity precluded Johnson's claims. RP 41.

G. The Court of Appeals Affirmed Dismissal of Johnson's Claims

Johnson appealed. In its unpublished opinion, the Court of Appeals affirmed the trial court's conclusion that the Department was statutorily immune for its actions during Johnson's disciplinary proceedings. Op. at 2. *See, e.g.,* 42 U.S.C.

[3] The trial court's written order granting summary judgment incorporated by reference its oral rulings. CP 381.

§§ 1396a(a)(49), 1396r-2, and 11132; 45 C.F.R. §§ 60.8-.94 2. As part of her opening brief to the Court of Appeals, Johnson attached as five appendices which were not part of the record before the trial court to which the Department objected, Opening Br. Apps. A-E[4], and the Department objected. Br. of Respondent at 26.

Johnson argued on appeal that the Department was not entitled to statutory immunity or, in the alternative, that the public duty doctrine allowed her to sue in tort. Op. at 5. She also argued for the first time on appeal that her due process rights were violated, that the statutory immunity violated the Washington Constitution, and that she was entitled to outstanding discovery from the Department. Op. at 6.

The Court of Appeals rejected these arguments and determined that Johnson's "claims are all based on disciplinary

[4] Appendix B includes the Withdrawal of Statement of Charges that Johnson references to this Court, Petition at 2, which was not properly before or considered by the Court of Appeals. Op. at 6.

proceedings. Accordingly, the Department is immune from liability, provided the Department's acted within the course of its duties." Op. at 10. The Court further held that the Department's fulfillment of its reporting duty is protected under RCW 18.130.300(1). Op. at 11 (citing *Hiesterman*, 24 Wn. App. 2d at 918).

The court also disagreed with Johnson that the Department was required to issue a Statement of Allegations before issuing a Statement of Charges. *Id.* (quoting RCW 18.130.172(1)). Because "Johnson's claims are based on official acts performed in the course of the Department's disciplinary proceeding … [it] is statutorily immune from liability." Op. at 11-12.

Having applied the statutory immunity, the court declined to consider Johnson's public duty doctrine argument. Op. at 12. It noted, however, that even if it were to consider her argument, "she fails to explain what duty the Department owed her that it did not owe the general public or what express assurances the

Department provided that would give rise to justifiable reliance on her part." Op. at 6 n. 3.

Finally, the court declined to consider Johnson's unpled and unpreserved due process claim and state constitutional challenge, and her claim of outstanding discovery. Op. at 12. Johnson failed to offer argument or authority to show a manifest error of constitutional dimension. Op. at 12-13. Johnson's petition to this Court followed.

IV. REVIEW SHOULD BE DENIED

A. The Court of Appeals Correctly Applied the UDA's Immunity to the Department's Disciplinary Proceedings and Mandated Reporting Activities

Johnson argues that the Department should not be "insulated" from liability related to the disciplinary proceedings,[5] but the Legislature has decided otherwise, as the Court of Appeals has consistently concluded on three occasions. "[T]he immunity afforded by RCW 18.130.300 exists … to protect the integrity of a uniform disciplinary process for health

[5] Petition at 1.

care professionals." *Janaszak*, 173 Wn. App. at 719. All the alleged conduct by the Department at issue relates to disciplinary proceedings and statutorily mandated reporting activities. Consequently, it falls squarely within the immunity provided by RCW 18.130.300(1).

1. RCW 18.130.300(1) extends immunity to the Department and its official disciplinary actions

There is no dispute that the conduct forming the basis for Johnson's claims occurred as a result of the Department's disciplinary response to a complaint against her. The immunity in RCW 18.130.300(1) is without exception and broadly applies to "any disciplinary proceedings or other official acts" conducted by the Department "in the course of [its] duties."

Such "official" acts include the Department's legally required reporting to the public and the Integrity Databank of any statement of charges or resolution by stipulation. *See* RCW 18.130.300(1). *See also* RCW 18.130.110(2) (The Department "*shall report* the issuance of statements of charges and final orders in cases processed by the [Department] to"

"[a]ppropriate organizations, public or private, which serve the professions" and "[t]he public") (emphasis added); *Hiesterman*, 24 Wn. App. 2d at 918 (the Department's "fulfillment of its reporting duty is conduct protected by statutory immunity under RCW 18.130.300(1)").

With the benefit of advice of counsel, Johnson waived her right to a formal disciplinary action and the opportunity to contest any alleged deficiencies in the disciplinary process. Instead, she chose to informally resolve the charges against her by entering a Stipulation. Johnson and her attorney reviewed, signed, and returned the Statement of Allegations & Summary of Evidence and the Stipulation. CP 1609.

Johnson entered the Stipulation with actual notice that it would be reported. In addition to the statutory requirements noted above, the Stipulation itself included express language that it would "be reported to the Health Integrity and Protection Databank (45 C.F.R. Pt. 61) and elsewhere as required by law." CP 1605. Further, the Stipulation expressly noted that "[i]t is a

public document and will be placed on the Department of Health's website and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW)." CP 1605.

All the conduct at issue falls within the statutory immunity and Johnson's claims were properly dismissed.

2. Division III's decision extending statutory immunity to the Department comports with published decisions in *Janaszak* and *Hiesterman*

The unpublished opinion in this matter joins Divisions I and II in acknowledging the importance of the immunity the Legislature provided under the UDA.

In *Janaszak*, the plaintiff asserted claims under 42 U.S.C. § 1983 for alleged violations of his rights under the United States Constitution. 173 Wn. App. at 720. He also alleged violations of the Washington Constitution and various tort claims. *Id.* at 711-12. Division I ruled, the "immunity afforded by RCW 18.130.300 exists not to protect individuals but to protect the integrity of a uniform disciplinary process for health care professionals. It guarantees the independence of these individuals and allows them

to protect the adequacy of professional competence and conduct without fear of suit." *Id.* (extending the absolute immunity of RCW 18.130.300 to the State and Department).

Similarly, in *Hiesterman*, a physician sued when his statement of charges and subsequent license suspension were reported to the public via a news release; however, the news release contained an inaccurate statement that he was convicted of a DUI, when in fact that charge had been dismissed. 24 Wn. App. 2d 907. The plaintiff argued the administrative act of reporting was not covered by immunity. *Id.* at 909. Division II held that the plain language of RCW 18.130.300(1) provided absolute immunity for the statutorily-mandated reporting. *Id.* at 910. This Court subsequently denied review. 1 Wn.3d 1020, 532 P.3d 161 (2023).

Division III now joins its sister divisions in finding absolute immunity under RCW 18.130.300 is critical to the integrity of the disciplinary process. Op. at 10. Johnson's "claims are all based on official acts performed in the course of the

Department's disciplinary proceedings. Consequently, the Department is statutorily immune from liability." Op. at 11-12. Review is not warranted under RAP 13.4(b)(1), (2), or (4).

B. This Case Presents No Significant Constitutional Issue Because Johnson Failed to Offer the Court of Appeals Any Argument under RAP 2.5(a)(3)

Unlike the plaintiff in *Janaszack*, Johnson did not bring an action for any alleged violation of her constitutional rights under 42 U.S.C. § 1983 or state law, CP 1-11. Nor did she raise any constitutional claims below. CP 1716-18, 186-205. She also failed to show a manifest error that would entitle her to review pursuant to RAP 2.5(a)(3).

"To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest and (2) the error is truly of constitutional dimension." *State v. J.W.M.*, 1 Wn.3d 58, 90, 524 P.3d 596 (2023) (internal citations omitted). Further, "[p]roof that an alleged error is manifest requires … a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the

trial of the case." *Id.* at 91 (alteration in original; internal quotation marks omitted).

Like in the instant case, the Court of Appeals in *Hiesterman* declined to consider the plaintiff's constitutional challenges under RAP 2.5(a)(3) because he failed to preserve the argument for appeal and the alleged constitutional errors were not manifest. *See* 24 Wn. App. 2d at 914. The *Hiesterman* court determined that the plaintiff could not show there was "no reasonable doubt that the statute violates the constitution." *Id.*

Johnson similarly failed to make such a showing here. She failed to present any argument to the Court of Appeals demonstrating that any constitutional error was manifest. Op. at 12-13. Further, neither a 42 U.S.C. § 1983 claim nor a tort claim for alleged violations of state constitutional rights would be actionable here. Because "neither a State nor its officials acting in their official capacities are 'persons' under § 1983, neither the State nor the Department can be held liable for violations of 42 U.S.C. § 1983." *Janaszak*, 173 Wn. App. at 720; *see also*

Hiesterman, 24 Wn. App. 2d at 723-24. The Court of Appeals properly declined to consider Johnson's alleged constitutional violations and review is not warranted under RAP 13.4(b)(3).

C. The Court of Appeals Properly Declined to Consider Claims of Error and Evidence That Were Not Part of the Record Below.

The Court of Appeals' decision not to consider Johnson's newly asserted public duty doctrine argument and discovery claims likewise do not warrant review. Other than a bald assertion of the public duty doctrine in her Court of Appeals briefing, Johnson "fail[ed] to explain what duty the Department owed to her that it did not owe to the general public or what express assurances the Department provided that would give rise to a justifiable reliance on her part." Op. at 6, n 3. Similarly, Johnson failed to advance any argument that the court committed a manifest error of constitutional dimensions related to alleged discovery issues. Op. at 12. Her briefing on this issue is similarly deficient now.

Finally, Johnson's perfunctory citation to RAP 13.4(b)(4) does not provide any grounds for this Court to review of the Court of Appeals' decision not to consider Johnson's "withdrawn formal Statement of Charges." Petition at 15. Johnson has failed to articulate an issue of substantial public interest related to that evidentiary decision that should be determined by this Court.

Instead, the Court of Appeals properly did not consider Johnson's Appendices B, C, and D because an "appendix may not include materials not contained in the record on review without permission from the appellate court" unless the issue "require study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like." Op. at 6.

Moreover, Johnson voluntarily waived her right to a formal disciplinary action and the opportunity to contest any alleged deficiencies in the disciplinary process. She opted, instead, to resolve the charges against her by a Stipulation. CP 1609. The document at issue – the formal Statement of

Charges – was not part of the record below, and the Court of Appeals decision not to consider it does not warrant this Court's review under RAP 13.4(b)(4).

D. The Court of Appeals' Unpublished Opinion Does Not Raise an Issue of Substantial Public Interest

For similar reasons, Johnson's invocation of RAP 13.4(b)(4) should be rejected. *See* Petition at 1-2, 8, 13, 15. RAP 13.4(b)(4) concerns issues of "substantial public interest." A decision that has the potential to affect multiple lower court proceedings may warrant review as an issue of substantial public interest to avoid unnecessary litigation and confusion. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). But the underlying opinion here does not have this potential.

Instead, the Court of Appeals correctly applied settled law on RCW 18.130.300(1) to the unique facts of this case. Its decision neither affects other proceedings nor sows the seeds of general confusion and unnecessary litigation. The decision is unpublished and therefore not precedential or binding on any court under GR 14.1(a). It also is fully consistent with the

decisions of other divisions of the Court of Appeals. Review is not warranted under RAP 13.4(b)(4).

V. CONCLUSION

Johnson's petition does not meet any of the criteria for review and review should be denied.

This document contains 4,990 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 28th day of April 2025.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the RESPONSE TO PETITION FOR REVIEW OF PETITIONER with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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

EXECUTED this 28th day of April, at Spokane, Washington.

s/ Heidi S. Holland
Heidi S. Holland
Senior Counsel

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

April 28, 2025 - 10:26 AM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Melinda Johnson v. State of WA, Department of Health
Superior Court Case Number:	12-2-02664-2

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