No. 80787-6

MADSEN, C.J. (dissenting)—The Court of Appeals correctly determined that summary judgment should have been granted in favor of the respondents and that Michael Jones's 42 U.S.C. § 1983 and state tort claims should be dismissed in their entirety. Unfortunately, the majority prolongs this baseless litigation as a result of its conclusion that genuine issues of material fact remain to be resolved. A close look shows that this is not the case and that an emergency situation justified summary suspension of Mr. Jones's pharmacist license because his numerous violations of state and federal laws put patients at serious risk of significant harm.

Summary judgment should have been granted on Mr. Jones's tort claims. He stipulated to findings of fact, conclusions of law, and an order suspending his pharmacist's license for five years and revoking his pharmacy's license. He explicitly agreed that there was sufficient evidence to support the stipulated facts, and he expressly stipulated to the conclusion of law stating that the facts establish numerous violations of statutes and administrative regulations governing pharmacists and pharmacies. He

claims, though, that he is not bound by these facts because the stipulation to facts is prefaced by a statement that he did not admit to the conduct. He should not be permitted this end run. If he were able to show that the evidence that he stipulated was sufficient was in fact fabricated, as he now claims, he should have made this argument to the Washington State Board of Pharmacy (Board). He did not. Regardless, he has failed to produce sufficient evidence of fabrication in the present proceeding and this, together with his stipulation that there was sufficient evidence to support the Board's suspension of his licenses, establishes that the licenses were justifiably suspended in August 1999. This being the case, Jones cannot show that he suffered harm as a result of the summary suspension of his licenses. Therefore, summary judgment should have been granted on the tort claims.

Summary judgment should also have been granted on the section 1983 claim because Mr. Jones fails to produce sufficient evidence to show a violation of a constitutional right. Although he claims that the individuals who inspected his pharmacy fabricated evidence of an emergency, and this led to summary suspension of his pharmacist and pharmacy licenses without an adequate predeprivation hearing, his claim of fabrication is supported only by self-serving, unsupported assertions, which are contradicted by his earlier declaration.

Analysis

Summary Judgment and Tort Claims

Mr. Jones has asserted claims for negligent supervision and tortious interference

with a business expectancy. Both are premised on alleged wrongful suspension of his licenses. Respondents contend, and the Court of Appeals agreed, that these claims are barred by Jones's failure to exhaust administrative remedies. The majority, in contrast, concludes that Jones did exhaust administrative remedies.

There is no exhaustion question here in the usual sense, where exhaustion of administrative remedies is a necessary prelude to an appeal in court addressing issues that were decided in an administrative setting. Jones's section 1983 and tort claims were not before the administrative body. That body instead determined whether Jones committed violations of laws pertaining to pharmacies and pharmacists and the appropriate sanction for such violations. Exhaustion in its traditional sense clearly does not apply here.

However, the administrative proceedings are certainly relevant because they involve suspension of his licenses, which he contends caused the loss of his franchise and other harm. For two reasons, the administrative proceedings foreclose his state claims. First, on August 17, 1999, Jones received a copy of the ex parte order of summary suspension. The notice that Jones received informed him that he could contest the summary action by written motion, but if he did, it would waive his right to a prompt hearing. On August 31, 1999, Jones filed a motion to modify and stay the summary suspension, thereby waiving the right to a prompt hearing.

Jones could have had a prompt hearing and a quick resolution of the issue whether his licenses should be suspended, but he elected not to do so. In addition, when Jones filed the motion to stay the summary suspensions, he was advised that he could give oral

argument on the issue, but he declined. The motion to stay was decided by a full panel of the Board only 21 days after the ex parte order and on the basis of Mr. Jones's history of violations. The Board was concerned that Jones would not remain in compliance with requirements, as demonstrated by the December 1998 inspection that showed numerous violations, followed by the February inspection showing compliance, followed by the July and August inspections again showing numerous violations—many of the same kind as occurred in December.[1]

This history of the administrative proceedings shows that Mr. Jones had opportunities to quickly resolve the matter of his license suspension, but did not take them.

Second, and more importantly because it is conclusive, the administrative proceedings show that as a matter of law Jones did not have a right to retain his licenses and the summary suspension was appropriate. He cannot, therefore, establish that loss of the licenses caused him harm.

Mr. Jones's pharmacist and pharmacy licenses were summarily suspended by an ex parte order because the Board determined that Jones operated the pharmacy in a manner below the standard of care for operation of a pharmacy in this state and "placed the patients of his pharmacy at serious risk of significant harm." Clerk's Papers (CP) at 323. Jones stipulated that the evidence was sufficient to support the Board's findings

[1] The nature of the violations in December 1998 and July and August 1999 is set out in detail below in connection with the section 1983 claim.

regarding numerous recurring violations, and he stipulated to the Board's conclusions of law that he violated numerous statutes and regulations governing the practice of pharmacy and the operation of pharmacies. Having done so, he agreed that he committed the violations justifying the suspension of his licenses. He also expressly stipulated that suspension of his licenses itself was justified.

Mr. Jones contends, however, that he is not really bound by the findings because they are preceded by the agreed-to statement that he did not admit to the conduct described. I do not believe that the stipulation is rendered wholly nugatory by this device, but it makes no difference. As explained at length below, Jones has not presented sufficient evidence to establish any genuine issue of material fact on the question whether the evidence of violations found by the inspectors was fabricated, other than his own self-serving statements that are inconsistent with his earlier testimony.[2] Since he does not show that the evidence was fabricated, and because he agreed the evidence was sufficient to support the facts, agreed to the conclusions, and agreed to the order of suspension, Mr. Jones cannot establish that the suspension of his licenses, which he claims caused the harm that he alleges, was wrongful or unjustified. He therefore should not be permitted to litigate issues that he has foreclosed through his own stipulations.

Whether this is viewed as a variant of the exhaustion doctrine or a form of estoppel or preclusion really is not the critical point. What matters is that Jones cannot show any genuine issue of material fact on causation, an element of each of his tort

[2] The inconsistencies are addressed in detail below.

claims, because of his stipulations. Just as explained below in connection with the 1983 claims, Jones cannot create a material issue by contradicting the stipulations he made.

I would hold that summary judgment was improperly denied with regard to the negligent supervision and tortious interference claims.

Summary Judgment and Section 1983 Claims

I turn now to the more fact-intensive inquiry whether Jones raises any genuine issue of material fact to preclude summary judgment on his section 1983 claim. Briefly stated, aside from Jones's own bald assertions of unprofessional conduct and weighted scores on the part of the inspectors and his own statements that violations did not occur, which are contradicted by his own testimony admitting violations, there is very little to this claim. But showing this to be the case necessarily involves close examination of the asserted facts.

The Board summarily suspended Mr. Jones's professional licenses after his pharmacy received failing scores in consecutive inspections at his pharmacy. Under RCW 18.130.050(7), WAC 246-869-190(8), and WAC 246-11-300, the Board can take emergency action and summarily suspend a pharmacist's license pending further disciplinary hearings if the Board determines that there is an immediate danger to the public health, safety, or welfare that can be addressed only by summary action. A suspension under these provisions takes effect upon entry of the order, but compliance with a summary action order is not required until the individual either is served with the order or has knowledge of it. WAC 246-11-310. The Board's summary suspension order

was issued August 17, 1999, and later that same day the statement of charges and ex parte order of summary action was served on Mr. Jones. A notice for opportunity of settlement and hearing was served on Jones at the same time.

Jones alleges that he was deprived of his licenses without due process of law, contending that due process required a predeprivation hearing. Although he concedes that if summary suspension of his licenses was necessary in the face of a public emergency, then a predeprivation hearing was not a constitutional mandate, he contends that he has presented sufficient evidence that the individuals who inspected his pharmacy, Phyllis Wene and Stan Jeppesen, fabricated an emergency in order to justify the summary suspension.

Wene and Jeppesen maintain, however, that they are entitled to qualified immunity from suit under section 1983.[3]

A court may determine the issue of qualified immunity either by deciding whether

[3] Government officials performing discretionary functions are entitled to qualified immunity "from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if the case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, __ U.S. __, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). The United States Supreme Court has "'repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Id*. (quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam)). Indeed, the Court said in *Harlow* that the standard of "objective reasonableness of an official's conduct, as measured by reference to clearly established law" should "permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. at 818; *see also Johnson v. Fankell*, 520 U.S. 911, 915, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997).

The Court of Appeals held that the Board's executive director, Donald Williams, was absolutely immune from suit under section 1983, and Jones has not challenged this holding.

the facts that the plaintiff alleges or shows make out a violation of a constitutional right or by deciding whether the constitutional right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, __ U.S. __, 129 S. Ct. 808, 815-16, 172 L. Ed. 2d 565 (2009). Thus, summary judgment is proper on the basis of qualified immunity if the plaintiff fails to produce sufficient evidence that a constitutional right has been violated, as is the case here.

Here, respondents presented sufficient evidence to support summary judgment on the ground that an emergency justified the summary suspension of Jones's licenses without a predeprivation hearing. However, the majority concludes that Mr. Jones, the adverse party, responded with sufficient facts to create a genuine issue of material fact on the issue whether the inspectors fabricated the evidence of an emergency that led to the summary suspension of Jones's licenses. Therefore, the majority concludes, summary judgment on qualified immunity was properly denied. I strongly disagree.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." CR 56(c). CR 56(e) provides that "[w]hen 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." Here, the facts and reasonable inferences from the facts must be construed in Mr. Jones's favor as the nonmoving party. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic*

Assocs., P.L.L.C., 168 Wn.2d 421, 429, 228 P.3d 1260 (2010).

"A fact is an event, an occurrence, or something that exists in reality." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (citing Webster's Third New International Dictionary 813 (1976)). "It is what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Id*. (citing 35 C.J.S. *Fact* 489 (1960)). "'The 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient.'" *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002) (quoting *Grimwood*, 110 Wn.2d at 359).

Contrary to Mr. Jones's argument, and the majority's assessment of the facts, Mr. Jones has failed to produce sufficient evidence creating an issue of fact on whether the evidence of an emergency was fabricated. Mr. Jones relies heavily on his own declaration, submitted in opposition to the motion for summary judgment. A party is entitled to present a declaration or affidavit and set forth facts made on personal knowledge, but cannot merely state ultimate facts or make conclusory assertions and have them accepted at face value, as Mr. Jones has done. Moreover, as the respondents maintain, Mr. Jones has admitted to several of the violations—violations that establish that the summary suspension of Jones's licenses was justified by an emergency situation. Further, many of the factual assertions in Jones's declaration submitted for purposes of the summary judgment ruling conflict with the facts he stated in his earlier declaration to the Board submitted in connection with a motion that he filed with the Board for a stay of

the summary suspension.

Wene and Jeppesen inspected the pharmacy on July 12, 1999, and then, because the pharmacy received an unsatisfactory score (below a score of 80) they reinspected it on August 10, 1999. *See* WAC 246-869-190. Among the inspectors' findings at these inspections were that Jones failed to maintain adequate records that showed patient allergies and significant medical history; that his medical records system lacked the capability of producing an audit trail, i.e., showing materials and documents required for filling a prescription and changes made to the prescription record; that Jones could not produce written authorizations for customers to whom he dispensed prescription drugs in nonchild-resistant containers; that he had outdated prescription stock on his shelves; that Mr. Jones's inventory records for controlled substances were not complete and he could not locate all requested inventory records after being allowed extra time; and that there were several deficiencies in his record-keeping for controlled substances. Evidently Mr. Jones did not dispute that other violations occurred, for example, that he had prescription containers on his shelves displaying NDC (National Drug Code) numbers that did not match the drugs contained inside.

The record also includes relevant material concerning previous inspections of Mr. Jones's pharmacy. His pharmacy was inspected by Inspector Wene on December 17, 1998, and received an unsatisfactory score of 79. The record shows that a number of the same kind of violations reported following the July and August 1999 inspections had also been found during the December 1998 inspection. The pharmacy was reinspected on

February 3, 1999, and received a passing score of 96.

In his petition for review and supplemental brief, Jones identifies the evidence that he says demonstrates a material fact question about whether government officials reasonably believed that an emergency existed.

Initially, much of the "evidence" that Jones claims is sufficient to create a genuine issue of fact on fabrication of an emergency is his testimony about bad behavior, unprofessionalism, ill will, and improper motive on the part of the inspectors. However, evidence of unprofessional conduct or misbehavior on the part of the inspectors does not, in and of itself, create a question of fact as to fabrication. On the other hand, if there is evidence of fabrication that meets the requirements of CR 56(e), then evidence of unprofessional conduct and misbehavior could weigh in Mr. Jones's favor as tending to show reason for fabrication and thus adding to an inference from all the facts of fabrication.

I therefore turn first to the "evidence" that Mr. Jones presents on the question whether the inspectors fabricated an emergency. This involves a close look at the evidence submitted on summary judgment pertaining to the inspectors' findings of violations of statutes and rules regulating pharmacies and pharmacists.

Much of this evidence does not consist of evidentiary facts that may be considered in determining whether a material issue of fact exists. This includes Jones's testimony in the summary judgment declaration that in July and August 1999 his pharmacy was in better shape than it had been in February, when he received the score of 96; that since

receiving his pharmacist's license he had worked at numerous pharmacies that were subjected to numerous inspections and his pharmacy in July and August was in greater compliance with pharmacy rules and regulations than many of those pharmacies, which received passing scores; and that in numerous instances the inspector deducted the maximum five points for minor discrepancies.

These conclusory statements of fact are not sufficient to create a genuine issue of material fact. *Overton*, 145 Wn.2d at 430; *Grimwood*, 110 Wn.2d at 359; *Am. Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 767, 551 P.2d 1038 (1976). Jones presents no admissible facts in support of these statements. He does not present facts that show that the conditions in the other pharmacies were comparable to his—for example, in the way that they kept records of patients' allergies or other relevant medical histories, the way they kept records of authorizations for dispensing prescriptions in non child-resistant containers, and so on, nor does he present facts regarding the scores they received. He simply makes a conclusory statement that his pharmacy was in greater compliance than others where he had worked.

His statement that his pharmacy was in better shape than in February is also an unsupported conclusory statement. Also, in this connection, although Jones complains that the July inspection was out of the ordinary because it occurred only five months after the February inspection, there appears to be nothing untoward about this timing. The February inspection was a reinspection following the pharmacy's failing score in December. As set forth in the amended statement of charges, the December 1998

violations included but were not limited to

> [f]ailing to obtain chronic conditions on patients of the pharmacy; . . . [d]ispensing the majority of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber; . . . [v]arious required records required by state and federal law were either inaccurate, incomplete or not available; . . . [m]any of the prescriptions in the will call area had labeled expiration dates exceeding the manufacturer's expiration date; . . . [m]ost of the prescriptions in the will call area contained the incorrect NDC number for the product in the prescription container.

CP at 362. Thus, as it turned out, in fact many of the violations found in the July and August inspections were the same type of violations that had occurred in December—providing some confirmation of the need for continuing to inspect pharmacies with a history of noncompliance.

Next, Jones's "evidence" about being assessed the maximum points for minor deficiencies identifies none of the deficiencies to which he refers and he produces no evidence regarding what might have been a more usual or reasonable or normal point deduction. Again, Jones simply makes a conclusory statement without evidentiary facts to support it.

Jones next maintains that contrary to inspection reports, his prescriptions were in sequential order and if any were missing he believed they had been taken by a former employee, whom he fired for misconduct and who, he claims, was an anonymous informant for the state. With regard to the allegation about employee theft, there are no evidentiary facts whatsoever in support of this assertion. His claims about the fired employee are speculative. The nonmoving party "may not rely on speculation,

argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If Jones's claim that missing prescriptions had been stolen has any basis in fact, Mr. Jones has not provided evidence to this effect.

As to record-keeping deficiencies with regard to prescription inventories, pharmacists are required to keep detailed records of all quantities of controlled substances bought and sold, and an inventory must be performed every two years. 21 U.S.C. § 827. In the report following the July inspection, Inspector Jeppesen stated that Jones's inventory records were incomplete and Jones could not locate the records even after being allowed an extra day to do so. The August report stated that there were numerous holes in the prescription files, with 21 missing from two consecutive days. Although Jones claims that his pharmacy inventory records were in sequential order, this assertion in the summary judgment declaration is inconsistent with his earlier declaration to the Board in connection with his motion to stay his license suspension. There, he admitted that he was missing prescription records at the time of the August inspection, acknowledging that he had an employee spend a week to go through the files and saying that some prescription records could not be located because they had been misfiled. He admitted in the summary judgment declaration that there were additional missing prescriptions that he could not locate, but, as discussed above, blames their absences on the former employee.

Jones also relies on his testimony in the summary judgment declaration as creating

issues of fact with regard to other violations. As with the statements about missing prescriptions, a great deal of this "evidence" contradicts statements in his declaration to the Board.

Self-serving affidavits contradicting prior sworn testimony cannot be used to create an issue of material fact. *Overton*, 145 Wn.2d at 429-31; *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999). "'When a party has given clear answers to unambiguous . . . questions [in a deposition] which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.'" *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (quoting *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)); *accord*, *e.g.*, *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 122, 22 P.3d 818 (2001); *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 430-31, 983 P.2d 1155 (1999). The two statements must be clearly contradictory. *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 322-23, 14 P.3d 789 (2000).[4]

[4] Along similar lines, the respondents contend that the doctrine of judicial estoppel bars consideration of conflicting statements in the later summary judgment declaration to create a material issue of fact. Judicial estoppel bars a party from asserting one position in one judicial proceeding and in a subsequent proceeding taking an inconsistent position to gain an advantage. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Although there is no exhaustive formula, the principle inquiries are whether the later position is clearly inconsistent with the first, whether acceptance of the later position would be construed as showing that the court in one or the other of the proceedings was misled, and whether the party would obtain an unfair advantage or the opposing party an unfair detriment if estoppel is not applied. *Ashmore*, 165 Wn.2d at 951-52; *Arkinson*, 160 Wn.2d at 538-39.

Contrary to Jones's assertions in his answer and supplemental brief, the admissions that he made confirm that the violations occurred and that there is no genuine issue of fact regarding alleged fabrication of evidence of any emergency.

First, Jones refers to the testimony in his declaration in opposition to summary judgment for evidence that contrary to the July inspection report he had entered allergy and chronic disease information about his customers, but unknown to him the computer program he used recorded the information but did not process it; that after that inspection he contacted officials in connection with his computer system and they turned on the part of the program that processed medical conditions; that he did have written records of patients' requests for nonchild-resistant caps; that he had a regular process for checking outdated medications; that he did not have 38 outdated items on the shelves at the time of the July inspection and had no outdated items on his shelves after the August inspection; that he had matched Federal Food and Drug Administration (DEA) order forms with invoices; and that he had performed the inventory of Schedule II and Schedule III drugs before the August reinspection.

This evidence does not create a material issue of fact. With regard to patients' medical conditions and histories, Inspector Jeppesen stated in his report of the July 1999 inspection that during approximately four hours of observing Jones process prescriptions, the computer medical records system used (QS-1) did not demonstrate an alert for allergy, therapeutic duplication, disease state interactions, or any other warning. CP at 284. In his August 1999 inspection report, Jeppesen stated that there were

> six patients noted in computer system with no allergy information. 2 of 5 patients without disease state data. Drug-disease state interaction module has been turned off. Pharmacist without knowledge of meaning of drug-drug interaction levels or how to find definitions or meanings. Pt. profile do [sic] not reflect what the patient actually received.

Id. at 288.

Jones said in his summary judgment declaration that contrary to the inspection report, he did enter allergy and chronic disease information into his computer record, but unknown to him the system was recording the information but not processing it. He said that "[t]his was corrected by the second inspection." *Id*. at 767. In his declaration to the Board, Jones said that although information about allergies and chronic conditions had always been obtained from patients, there was a

> question as to whether it was being properly inputted into the computer. Further, the disease state-drug interaction fields were thought (by the inspectors) to have been turned off. Therefore, while the inspectors were at lunch on August 10th, I contacted my computer vender to discuss these problems. I was informed, much to my surprise, that these features were left <u>off</u> by the company (i.e., never turned on by them), unless they were specifically requested to do so. . . . [T]his function was operational by the time [the inspectors] returned from lunch.

Id. at 341.

Jones's own declaration confirms the inspector's report that the computer system was not processing and thus not alerting Jones or anyone else at the pharmacy of any allergies, drug interactions, therapeutic duplications, etc. Moreover, although Jones said in his summary judgment declaration that this was corrected "by" the second inspection, this statement directly contradicts his earlier declaration to the Board where he stated that

during the time the inspectors were at lunch on August 10, 1999, the date of the reinspection, he contacted the computer vendor and only then learned that his system was not processing the necessary information because the feature was "off."

In the face of a failing inspection score and the inspection report stating that he was not accessing disease state, drug interaction, and other vital information, Jones, by his own account, did not make an effort to resolve this issue until the same matter came up during the reinspection.

Next, in the inspection report for July 1999, Inspector Jeppesen stated that when Mr. Jones was asked about his computer system, after "a number of verbal transactions" it was determined that the system could change prescription data without an audit trail to track changes. *Id*. at 284. Jeppesen reported that Jones's computer system did "not have the ability to track changes made to the prescription record. No tracking for audit purposes possible." *Id*. at 289.

Jones said in his declaration to the Board that

> the inspectors were concerned that our QS-1 system was inadequate for the minimum procedures for utilization of the patient medication system and for creating an accurate and complete audit trail for changes made to the prescriptions after filling. . . . I have spoken with the QS-1 technical support personnel, the system is fully capable of performing these functions, and I am able to utilize these functions. . . . I would gladly show an inspector how it is done."

Id. at 344. This declaration shows that the QS-1 system was capable of making audit trails but that Jones had to learn this from the vendor's support personnel, and his declaration to the Board shows this occurred after the first inspection. This declaration

sufficiently shows that the system was capable of creating audit trials, contrary to the inspector's report, but it also shows that Jones did not know how to demonstrate this to the inspectors. In effect, whether the system was capable of being operated was one thing, but whether it was operable was another, and Jones's own declaration shows that he had to learn the system from the technical support personnel after the July inspection occurred and he did not have the system on before that or know how to use it.

Another major problem identified by the inspection reports was the lack of written authorizations from patients permitting Jones to dispense prescriptions in nonchild-resistant containers. WAC 246-869-230 requires that legend drugs be dispensed in a child-resistant container unless an appropriate authorization is received by the pharmacist. The Federal Poison Prevention Packaging Act and accompanying regulations has similar requirements. 15 U.S.C. §§ 1471-1476; 16 C.F.R. § 1700.5.

Inspector Jeppesen stated in his report following the July inspection that Jones could not locate patient authorizations for many customers to whom he had dispensed prescription drugs in containers that were not child resistant, noting that the "blue three ring binder where [Mr. Jones] had patients sign for authorization to have non-safety caps dispensed . . . is divided into alphabetic sections, with several to many pages of signatures listed down each page, on both sides. Many signatures are difficult to impossible to read, and are not in alphabetic order within the section." CP at 283. When Jones was requested to find authorizations for seven patients with last names beginning with "B," the report states, Jones could locate only two of the authorizing signatures. *Id*.

Following the August reinspection, Jeppesen's report said that there were 41 prescriptions on Jones's will-call shelf and only one had a child-resistant container. The one container had been supplied by the drug manufacturer.

In his declaration to the Board, Jones admitted that his patient authorizations "may not have been organized for ease of reference," *id*. at 342, and his attorney said in a declaration to the Board that Jones's "record-keeping system for the signatures did not allow for one to readily verify specific signatures." *Id*. at 349.

Jones himself acknowledged that his records were not organized for ease of reference, and this confirms that he did not have a system designed for verifying who had authorized prescriptions dispensed in nonchild-resistant containers.

Another area where Jones's pharmacy was marked down concerned outdated/deteriorated stock. The DEA requires that drugs be assigned expiration dates designed to coordinate with drug stability. 21 U.S.C. § 321; 21 C.F.R. § 211.166.

Inspector Jeppesen's report following the July 1999 inspection states that 38 items in Jones's prescription stock area were outdated. Following the August reinspection, Jeppesen's report noted that 11 items on Jones's shelves and in his refrigerator in the pharmacy were outdated.

In his declaration to the Board, which was dated August 27, 1999, Jones stated:

> All outdated legend and OTC [(over the counter)] products have been removed from my shelves. In order to avoid any problems with this in the future, we will now do a monthly review instead of quarterly, for outdates. This will ensure that no outdates remain on the shelves. I also had "Returns

by Howard" come out, inspect for outdates, too, and process our returns. CP at 343. Jones's attorney said in his declaration that some of these outdated items had "slipped through the cracks." *Id*. at 350.

This declaration establishes that Jones did have outdated items on the shelves because he stated that he had removed them, that he did quarterly rather than monthly reviews, and that he believed that a new system would resolve the problems he had had with outdated materials on the shelves.

In his summary judgment declaration, however, Jones stated: "I had a regular process for checking outdated medications and did not have 38 outdated items on the shelves." *Id*. at 767.

His "regular process" was, according to his earlier declaration, a quarterly review rather than monthly, which he then decided to replace with a monthly review. His declarations together establish that he did have outdated items (though he evidently disputes they totaled 38 items) and that he had to alter his review process to assure that outdated items were removed in a timely fashion.

Finally, there are special requirements for keeping records of Schedule II drugs, such as morphine, cocaine, and methamphetamine. The Schedule II inventory records must be kept separately from other records, and DEA order forms must be prepared and executed by the dispensing pharmacist and kept for two years. 21 U.S.C. § 827(b); 21 C.F.R. § 1305.06, .13. WAC 246-887-020 implements these requirements in this state.

Jeppesen's report following the July inspection stated that Jones could not find

Schedule II records and that after being allowed an additional day, Jones still could not locate them. After the August inspection, the report stated that the DEA forms were not complete, that the Schedule II inventory was not signed as required, that Schedule II invoices were filed with general invoice records rather than separately, and that a required DEA number was not on the Schedule II inventory.

In his declaration submitted to the Board, Jones admitted that some DEA forms were missing, stating that one order had not been received, another had been lost between the pharmacy and the wholesaler, and that a third order "had not been checked in yet." CP at 344. He stated that he subsequently prepared the third form and described a new procedure for keeping invoices with DEA forms. Although Jones offered these various explanations, he did not dispute that these forms were missing or incomplete.

In light of Jones's admissions in the declaration to the Board, the inconsistencies between this declaration and the declaration that he submitted for purposes of the summary judgment motion, and his failure to present actual evidentiary facts in support of his many conclusory statements of ultimate fact in this self-serving declaration,[5] he has not shown a genuine issue of material fact on the question whether the inspectors

[5] The majority objects to my calling Jones's statements self-serving, claiming that we cannot consider the self-serving nature of a declaration because it involves credibility. Majority at 18 n.7. Our case law is directly to the contrary. Where statements directly contradict earlier sworn testimony, we can dismiss them as self-serving and can do so in the context of a summary judgment motion. *Overton*, 145 Wn.2d at 429-31. The majority also objects to my characterization as "conclusory" Jones's statement that his pharmacy was in better condition at the time of the July and August inspections than it had been in February 1999. Majority at 18 n.7. That statement says nothing about what the condition was, or how in any factual way it was better. Facts are insufficient to defeat summary judgment when they are "'[u]ltimate facts or conclusions of fact.'" *Overton*, 145 Wn.2d at 430-31 (quoting *Grimwood*, 110 Wn.2d at 359.

fabricated evidence of the violations they found.

As the Court of Appeals recognized, cases demonstrate that the violations that occurred here can cause serious harm. For example, in *Wahba v. H&N Prescription Ctr., Inc.*, 539 F. Supp. 352 (E.D.N.Y. 1982), a two-year-old died after ingesting his mother's prescription pills that were dispensed in a container lacking a child-resistant cap. In *Baker v. Arbor Drugs, Inc.*, 215 Mich. App. 198, 544 N.W.2d 727 (1996), a pharmacy patient suffered a stroke after a pharmacist filled prescriptions for incompatible drugs because the pharmacist failed to properly use a computer system that would have warned of the danger of the drug interactions.

Under the circumstances of this case, there is no genuine issue of material fact as to whether evidence of the violations found by Wene and Jeppesen was fabricated.

The majority believes, however, that Inspectors Wene's and Jeppeson's assignment of lower inspection scores in July and August 1999 than upon inspections in December 1998 and February 1999 and the "lack of apparent reasons for the change" are facts[6] that could lead a reasonable juror to believe that Wene and Jeppesen fabricated an emergency. Majority at 18. It is difficult to respond to this conclusion because it is so inconsistent with the facts of this case.

Mr. Jones violated numerous state and federal statutes and regulations as found in

[6] The majority says that other facts that support this conclusion are the inspectors' aggressive behavior and Jones's claims that many of the violations were not as bad as the inspection reports claimed. As I explain, Jones's assertions about aggressive behavior are not material under the facts of this case and his assertions that violations were not as bad as claimed is belied by his stipulations and his own contradictory statements.

December 1998. These laws are not concerned merely with keeping paperwork up to date and ministerial tasks. They are laws that provide necessary protection to patients who obtain prescription drugs. Matters of life and health are, quite literally, at stake. They also concern proper record-keeping and tracking for controlled substances.

After the December 1998 inspection, Mr. Jones improved his practices—temporarily—but then reverted to his former practices, with his patients' lives and health again at risk. He literally was not accessing any information about patients' disease states, allergies, and drug interactions until he finally asked for assistance from his computer vendor on August 17, 1999 while the inspectors were at lunch. One can legitimately ask how a pharmacist could fail to realize that he was not seeing such information in his computer records, but the fact, and it is incontrovertible, is that he was not accessing this information.

He did not properly label drugs, he had outdated items on his shelves—even upon the reinspection in August, and he could not locate authorizations for child proof caps for the majority of the patients for whom he was asked to retrieve this information. His records of controlled substances were not in order.

The record itself shows why, if they were in fact given,[7] lower scores were justified. Mr. Jones was, quite simply, a "repeat offender." Despite earlier inspections and earlier attempts to improve his manner of operating his pharmacy, his repeated and

[7] The record does not permit an across the board comparison of scores because the record does not contain detailed information about the scores for any of the inspections. It is speculative to conclude that Mr. Jones was given lower scores for the same misconduct.

numerous violations again put countless patients at risk.

But the bottom line is that the difference in scores makes no difference because the difference in scores does not create a genuine issue of material fact about fabrication of an emergency. The record of the actual violations that put patients at high risk, of which Mr. Jones's own statements and stipulations are a significant part, establish without any question whatsoever that an emergency existed.[8]

This being the case, Jones's assertions that the inspectors engaged in unprofessional behavior are irrelevant. Because fabrication is necessary to Jones's claim that a constitutional violation occurred as a result of being denied a predeprivation hearing, Jones has not presented sufficient evidence to show a genuine issue of material fact on the issue whether there was a violation of a constitutional right. And as mentioned, he concedes that if there was an emergency, then a predeprivation hearing was not required by due process.

Conclusion

Mr. Jones stipulated that there was sufficient evidence to support the stipulated findings of fact in the Board's decision, and he stipulated that these facts establish many violations of statutes and administrative regulations governing pharmacists and pharmacies. Jones stipulated that suspension of his licenses was justified. In addition, Mr. Jones has not established that any genuine issue of material fact exists as to whether the individuals inspecting his pharmacy fabricated the evidence that he committed the

[8] Nothing in Jones's own statements and stipulations was fabricated by Wene and Jeppesen.

violations. Instead, the claim of fabrication is supported only by self-serving, unsupported assertions in the declaration he submitted for summary judgment purposes. These assertions are, in key respects, also contradicted by his earlier declaration submitted to the Board in connection with his motion to stay the summary suspension of his licenses.

Since he has not raised a genuine issue as to whether the evidence was fabricated, and he agreed it was sufficient to support the findings of fact, agreed to the conclusions, and agreed to the order of suspension, Mr. Jones cannot establish that the suspension of his licenses was wrongful or unjustified. It follows that he cannot show that he suffered harm as a result of the summary suspension of his licenses; he cannot establish the causation elements of his tort claims. Accordingly, summary judgment in favor of respondents was proper with respect to Mr. Jones's tort claims.

In addition, because he has failed to produce sufficient evidence of fabrication, Mr. Jones has not produced sufficient evidence of a violation of a constitutional right. Summary judgment was therefore properly granted in favor of the respondents on Jones's section 1983 claim.

I would affirm the grant of summary judgment in favor of the respondents and accordingly dissent from the majority opinion.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Susan Owens

Justice Gerry L. Alexander

Justice James M. Johnson