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No. 38061-7-II
DIVISION II
COURT OF APPEALS
OF THE STATE OF WASHINGTON

TIMOTHY B. JOLLEY, M.D.,

Appellant

v.

REGENCE BLUESHIELD,

Respondent

RESPONDENT'S BRIEF

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I.

INTRODUCTION

The trial court properly dismissed Dr. Jolley's claims, and Regence BlueShield ("Regence") asks the Court to affirm the dismissal. Based on Dr. Jolley's inappropriate behavior toward the mothers of his patients, the suspension of and conditions placed on his license to practice, and his expulsion from government programs, Dr. Jolley is not legally entitled to have a contract with Regence. Nothing in Washington law requires Regence to contract with any provider, particularly a pediatrician who has a history of inappropriate sexual behavior. Dr. Jolley's Practitioner Agreement with Regence was terminable at will, and it is undisputed he has no substantive right to be contracted with Regence.

The trial court properly rejected Dr. Jolley's procedural claim that he did not receive "fair review" of Regence's decisions to terminate his contract. The record is completely devoid of any facts to support Dr. Jolley's position that he was treated unfairly. Rather, the evidence indisputably proves that Dr. Jolley received multiple notices of Regence's intent to terminate his contract and the reasons therefor, and he had numerous full and fair opportunities to present his position to appeal committees consisting of peer providers and Regence management and to an arbitrator during a two-day arbitration hearing. Dr. Jolley was

aggressively and ably represented throughout this process by his attorney, Ted Coulson, and he has no basis to complain about the review process.

The fact that Dr. Jolley was unable to convince Regence to change its decision to terminate his contract does not render the process unfair. Similarly, the fact that the trial court rejected Dr. Jolley's claims of deficiencies in the process does not mean that the trial court erred or failed to independently and adequately consider the voluminous evidence submitted on the parties' cross-motions for summary judgment. The trial court's ruling should be affirmed.

II.

RESTATEMENT OF ISSUES

The Superior Court properly dismissed Dr. Jolley's claims for the following alternative reasons:

1. The undisputed facts demonstrate that Dr. Jolley received "fair review" of Regence's decision to terminate his agreement where Regence provided Dr. Jolley and his attorney numerous notices of the reasons for termination and multiple levels of review by Dr. Jolley's peers, by company management, and by an arbitrator;

2. Dr. Jolley failed to prove that a different review process would have caused Regence to overturn its decision to terminate his Practitioner Agreement;

3. Dr. Jolley cannot prove that any deficiency in the review process caused him damage because he was and remains ineligible to contract with Regence; and

4. Dr. Jolley cannot prove the essential elements of a Consumer Protection Act claim.

III.

STATEMENT OF THE CASE

A. Factual Background.

1. The Parties and Applicable Provisions of the Practitioner Agreement.

Regence is a non-profit health care services contractor that contracts with medical providers in the state of Washington to render medical services to Regence subscribers pursuant to agreed-upon fee schedules. Dr. Jolley is a pediatrician who practices in Puyallup, Washington. Dr. Jolley entered into a Practitioner Agreement with Regence on or about March 4, 1999. CP 69-85.

The Practitioner Agreement has three different provisions addressing termination. The first provision is self-executing and states:

This Agreement shall terminate immediately upon the suspension, revocation or nullification of the Practitioner's license to practice medicine in the state(s) where the Practitioner practices. It shall also terminate immediately in the event the Practitioner is convicted of a felony or is

expelled or suspended from the Medicare or Medicaid programs.

CP 82, ¶ 7.5 (emphasis added).

This self-executing provision applies to the egregious situation when a medical practitioner loses his or her license to practice medicine or is expelled or suspended from participation in government programs. Under these circumstances, the Practitioner Agreement “terminate[s] immediately.” *Id.*

Under the second provision, a “for cause” provision, Regence has the option to terminate a provider who does not meet the company’s credentialing criteria:

The Practitioner agrees that if he or she does not meet the Company’s Credentialing criteria at any time . . . this Agreement may be immediately terminated at the Company’s option, and the Practitioner shall have no right to be a participating provider with the Company.

CP 82, ¶ 7.4.

Regence’s credentialing criteria include the following:

To be eligible for participation, practitioners must meet and maintain the following criteria:

5. The practitioner’s professional State license, registration or certification in any State must be current and free of any informal or formal disciplinary action(s) (i.e. restriction, probation, limitation or condition) relating to the practitioner’s clinical conduct.

CP 494, ¶ III.A.5.

Lastly, the Practitioner Agreement contains an “at will” provision, under which either Regence or the practitioner can terminate the agreement “at any time and for any reason” with 60 days’ notice:

The parties agree that they are contracting at will. Notwithstanding any written or oral representations to the contrary, either party may terminate this Agreement at any time and for any reason upon sixty (60) days written notice to the other party. The terminating party has sole discretion to determine whether a reason exists for termination and whether that reason justifies termination In the event of a termination, the parties shall have no right to claim and do hereby waive and release any claim for damages that may result from or arise out of that termination, other than any claim that the Practitioner may have for services rendered to subscribers of the Company prior to the effective date of the notice of termination.

CP 81-82, ¶ 7.2 (emphasis added).

Washington law requires health carriers to file their Practitioner Agreements with the Washington State Insurance Commissioner for review and approval. WAC 284-43-330. Such Practitioner Agreements must include “procedures for review and adjudication of complaints initiated by health care providers” that “provide a fair review for consideration of complaints.” RCW 48.43.055; *see also* WAC 284-43-322. RCW 48.43.055 provides a remedy for a health carrier’s non-compliance: If the health carrier does not grant or reject a request for

review within 30 days, “the complaining health care provider may proceed as if the complaint had been rejected.”

Regence’s Practitioner Agreement requires exhaustion of the internal appeals process and arbitration before the provider may seek judicial review. CP 66-67. The internal appeals process has two levels of review. “Level One” is a written request by the provider for reconsideration and documentary review by the company’s Level One Appeal Committee, which includes practicing provider peers who are not Regence employees. CP 499-500. A practitioner who is dissatisfied with the outcome of Level One review can request a “Level Two” appeal. “Level Two” is an in-person hearing during which the provider and his or her attorney have the opportunity to present the provider’s position to the company’s Level Two Appeal Committee, which includes the company’s Chief Medical Officer and other executives of the company. *Id.* A provider who is not satisfied with the outcome of the Level Two hearing can demand arbitration of his or her dispute. CP 66-67.

2. Dr. Jolley’s License to Practice Is Suspended, Triggering Automatic and Immediate Termination of His Regence Practitioner Agreement.

On October 16, 2003, the Medical Quality Assurance Commission of the Washington State Department of Health (“MQAC”) issued a Statement of Charges against Dr. Jolley, charging him with several counts

of unprofessional conduct based on Dr. Jolley's sexual relationships with and sexual advances toward several mothers of Dr. Jolley's patients. CP 391-95. In the charging document, MQAC noted Dr. Jolley had previously been disciplined for the same behavior. *Id.* As a result of this earlier disciplinary proceeding, Dr. Jolley had restrictions placed on his license in 1988, which required him (among other conditions) to "(a) undergo special instruction in the ethics of pediatricians becoming sexually involved with patients' family members, (b) have a female chaperone accompany [him] when seeing female patients or a patient accompanied by a female, [and] (c) refrain from sexual involvement with patients' family members." CP 392, ¶ 1.8. After a one-year extension for Dr. Jolley's non-compliance with these conditions, MQAC reinstated Dr. Jolley's medical license in October 1992. CP 393, ¶ 1.11.

Later, MQAC discovered that Dr. Jolley's failure to comply with the conditions placed on his license in 1988 was even more extensive than it had previously suspected. From at least 1988 (during the last four years of his first license suspension) and continuing for the next 15 years to 2003, Dr. Jolley continued his behavior of making inappropriate advances toward and having sexual relationships with the mothers of his patients. CP 393-94, ¶¶ 1.14 to 1.20. Dr. Jolley admits that from 1988 and continuing to at least 2003, he failed to comply with the state-imposed

conditions on his medical license and continued to have sexual relationships with numerous mothers of his patients. CP 105-15.

On October 20, 2003, based on new complaints filed by four more mothers of Dr. Jolley's patients, MQAC "summarily suspended" Dr. Jolley's license to practice medicine in the state of Washington effective immediately. CP 404. The suspension of Dr. Jolley's medical license automatically and immediately terminated his Regence Practitioner Agreement. CP 82, ¶ 7.5.

Dr. Jolley did not inform Regence of the license suspension, as required by his Practitioner Agreement. CP 71, ¶ 2.6. Two days later, on October 22, 2003, Regence found out about the suspension through a news release issued by the Washington State Department of Health and an article published in the Seattle Times. CP 486-87, 505-7. Although the suspension of Dr. Jolley's medical license operated to immediately terminate his Regence Practitioner Agreement, Regence confirmed the termination by letter to Dr. Jolley on the same date.¹ CP 493-503. With this letter, Regence also reminded Dr. Jolley of his appeal rights and the company's credentialing criteria. *Id.*

¹ Because certain events, such as suspension of a physician's license to practice, automatically terminate the Practitioner Agreement, Regence's internal procedures permit credentialing staff to send the physician confirmation of the termination without prior review or approval by the company's credentialing committee. CP 102.

3. Dr. Jolley's License Is Reinstated With Conditions.

Subsequently, on October 24, 2003, Dr. Jolley moved for a temporary restraining order against MQAC, and the Pierce County Superior Court entered an order temporarily staying MQAC's suspension of his license to practice.² CP 97-100. The Court imposed a number of conditions on the 30-day stay, requiring that Dr. Jolley "have a chaperone present when examining a female patient or a patient's mother or female guardian is present" and "comply with MQAC Policy/Procedure Number MD2002-05."³ CP 100.

Dr. Jolley and MQAC entered into an agreed order in January 2004. CP 104-17. Dr. Jolley agreed with MQAC's findings regarding his prior disciplinary action in 1988, and he acknowledged that he had not complied with the conditions imposed on him at that time by refraining from sexual involvement with the mothers of his patients. CP 106-7, ¶¶ 2.7-2.13. Dr. Jolley admitted his acts constitute "unprofessional conduct" in violation of RCW 18.130.180(1), which prohibits acts

² Dr. Jolley's representation that his medical license was suspended "[b]etween October 20, 2003 and October 24, 2003" is not accurate. *See Appellant's Brief*, p. 5. Although the suspension was conditionally stayed on October 24, 2003, MQAC's suspension of Dr. Jolley's license to practice continues in effect through today.

³ MQAC Policy/Procedure Number MD2002-05 states: "Any sexual or romantic behavior between a health care provider and a patient or key third party is forbidden and constitutes sexual misconduct." CP 407. "Key third parties" include "person[s] in a close personal relationship with the patient" such as parents or guardians. *Id.*

“involving moral turpitude.” CP 110, ¶ 3.2. MQAC suspended Dr. Jolley’s license to practice medicine for a period of “at least ten years.” CP 110, ¶ 4.1. The license suspension was stayed subject to various terms and conditions, which require Dr. Jolley to have a female chaperone present whenever he sees a patient who is accompanied by a female parent or guardian, to have a female chaperone on the telephone for the duration of any telephone calls with female parents or guardians of patients, to cease from all social contact with female parents or guardians of patients, and to provide the following written statement to all parents or guardians:

I have been disciplined by the Washington State Medical Quality Assurance Commission because I entered into a romantic and/or sexual relationship with some of the mothers of my patients. The Commission is requiring that you be made aware of these events and sign a copy of this statement. The signed copy shall be placed in the medical record.

CP 110-11, ¶¶ 4.1-4.5.⁴

In response to Dr. Jolley’s subsequent request for clarification, MQAC confirmed that the January 2004 Agreed Order “constitutes formal

⁴ Dr. Jolley contends on appeal that MQAC “threw out” the sexual misconduct allegations. *Appellant’s Brief*, p. 19. But he cites no authority for this contention other than his attorney’s hearsay statement, which is inconsistent with MQAC’s orders and should not be considered on summary judgment. *See Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (“affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions”).

disciplinary action,” and Dr. Jolley “may not petition to terminate [the Order] until ten years after the effective date.” CP 413 (¶ 1.3) and CP 421 (¶ 3.17).

4. Dr. Jolley Is Terminated From Participation in Medicaid and Other DSHS Programs.

The Medical Assistance Administration of the State of Washington Department of Social and Health Services (“DSHS”) administers Medicaid and other state-funded medical care programs. WAC 388-500-0005. On December 18, 2003, DSHS notified Dr. Jolley that as a result of MQAC’s suspension of his license to practice on October 20, 2003, DSHS terminated his provider agreement. CP 509-10. DSHS later reaffirmed its termination decision, concluding based on Dr. Jolley’s admitted sexual misconduct “despite admonishment for similar conduct in years before” that “retaining [Dr. Jolley] as a provider poses a risk to the health and safety of one or more of [DSHS’s] clients.” CP 511-12. DSHS further noted that based on the conditions of practice imposed on Dr. Jolley’s license, he is ineligible to re-enroll. *Id.*

Regence recently confirmed that Dr. Jolley remains terminated from Medicaid and other state-funded health care programs. CP 487 (¶ 3), 513.

5. Dr. Jolley Appeals His Termination Through Regence's Internal Appeals Procedures.

With its October 22, 2003, letter confirming the October 20, 2003, automatic termination of his Practitioner Agreement, Regence informed Dr. Jolley of his appeal rights. CP 493-503. In response, Dr. Jolley asked Regence to bypass the formal appeals process and reinstate his contract on the ground that MQAC was “wrong” and the disciplinary proceedings against him were a “big mistake.” CP 516. Regence advised Dr. Jolley to follow the established appeals procedures. *Id.*

Through his attorney, Dr. Jolley asked Regence to reconsider its termination decision on the grounds that (1) “the Pierce County Superior Court [on October 24, 2003] found that the summary suspension [of his medical license] had *no operative effect*”; (2) the Superior Court found “that a stay of the summary suspension would *not* substantially harm any party;” and (3) the “conditions” imposed by the Superior Court “do not constitute limitations on Dr. Jolley’s license to practice medicine.” CP 142-44 (emphasis in original). Each of the grounds enunciated by Dr. Jolley misrepresented the Superior Court’s order: (1) the Superior Court never found that the summary suspension “had no operative effect;” (2) the Superior Court did not find an absence of harm, but merely stated that “[t]he threat to the public health, safety, or welfare is not sufficiently

serious to justify the [temporary] Order under the circumstances of this case;” and (3) the Superior Court imposed four specific conditions on Dr. Jolley’s license to practice medicine. CP 97-100. Regence’s Level One Appeal Committee considered Dr. Jolley’s appeal on November 20, 2003, including all correspondence and documentation submitted by Dr. Jolley and his attorney, and it voted to uphold the termination. CP 146-204, 206-8, 210.

Dr. Jolley then requested an in-person hearing before the Regence Level Two Appeal Committee. CP 212-13. Regence informed Dr. Jolley of the date and time set for the hearing, CP 218, and that he and his attorney would have 30 minutes to make oral presentations to the committee and respond to questions. CP 502-3. Regence also specifically informed Dr. Jolley and his attorney that the committee would review the termination “based on Dr. Jolley’s failure to meet Regence’s credentialing criteria due to certain conditions placed on his license,” CP 426, and invited Dr. Jolley to “submit[] additional, pertinent information supporting [his] perspective.”⁵ CP 499.

⁵ Dr. Jolley’s argument that “the brief suspension of Dr. Jolley’s medical license . . . was the only reason Regence had given Dr. Jolley” is demonstrably false. *See Appellant’s Brief*, p. 7.

Dr. Jolley attended the Level Two hearing with his attorney, Ted Coulson. CP 220-21. Dr. Jolley and Mr. Coulson gave oral presentations addressing Dr. Jolley's personal excuses that he believed justified his behavior and asserting that the conditions imposed on Dr. Jolley's license would sufficiently protect Regence's members from potential harm. CP 464-65. Considering all of the material submitted, the Level Two Appeal Committee voted to uphold the termination. *Id.*; CP 471-72. Regence's Chief Medical Officer, Dr. Mark Rattray, notified Dr. Jolley of the committee's decision by letter dated December 9, 2003. CP 474-79.

Dr. Jolley asked for reconsideration of the Level Two Appeal Committee decision on two grounds. CP 428-30. First, he contended that Dr. Rattray's letter of December 9, 2003, was the "first time" Dr. Jolley was informed that Regence considered the conditions on his medical license in its decision to uphold the termination. *Id.* Second, Dr. Jolley contended that "there are no conditions" on his license, but that the conditions "apply to Dr. Jolley himself, and not his license." *Id.* Neither of these contentions was true. Dr. Jolley had been specifically informed prior to the hearing before the Level Two Appeal Committee that the termination "was based on Dr. Jolley's failure to meet Regence's credentialing criteria due to certain conditions placed on his license," CP 426, and the Pierce County Superior Court's order clearly imposed

conditions on Dr. Jolley's license to practice medicine. CP 100. Regence denied Dr. Jolley's request for reconsideration.

6. Dr. Jolley Demands Arbitration; the Arbitrator Rules in Dr. Jolley's Favor, Awards Damages, and Regence Pays the Damage Award.

Dr. Jolley then filed an arbitration demand, and the parties agreed to resolve disputes using Commissioner JoAnne Tompkins of Judicial Dispute Resolution as arbitrator. CP 432-35. Without explaining the basis for her decision, the arbitrator ruled on August 13, 2004, that Regence wrongfully terminated Dr. Jolley's contract and did not provide him with an appeals process that met due process requirements.⁶ CP 229-30. The arbitrator ordered reinstatement of Dr. Jolley's Practitioner Agreement and awarded damages to Dr. Jolley in the amount of \$28,403.00. CP 230, 764. Regence reinstated Dr. Jolley's agreement and paid the amount of the damage award. CP 771.

7. Regence Provides Dr. Jolley Notice of Termination Under the Contract's "At Will" Provision.

In her August 2004 order, the arbitrator expressly recognized Regence's continued contractual right to terminate Dr. Jolley's Practitioner Agreement, noting: "Regence retains all rights to terminate

⁶ Subsequently, on Dr. Jolley's petition, Division One of the Washington State Court of Appeals ruled that the arbitration proceeding was not binding. *See Jolley v. Regence BlueShield*, 2007 WL 1733215 (Wn. App., Div. I, June 18, 2007), discussed further in Section III.A.10.

Dr. Jolley for any reason permitted under the contract, assuming all substantive and procedural due process rights are accorded or notice per the agreement is given.” CP 230.

Accordingly, on October 5, 2004, Regence notified Dr. Jolley of its decision to terminate his Practitioner Agreement pursuant to the “at will” provision of the agreement. CP 518-29. Regence advised Dr. Jolley that in making its decision, the company considered Dr. Jolley’s licensing restrictions and violations of credentialing criteria:

These criteria include the requirement that your professional license, registration or certification be current and free from any formal or informal disciplinary actions, including restriction, probation, limitation or conditions governing the terms under which you may continue to practice. Accordingly, as your license has been suspended and stayed with terms and conditions, you no longer meet Regence BlueShield participation criteria, Section III. A. 5.

CP 518 (emphasis added).

Although Washington law permits health carriers to terminate provider agreements on 60 days’ written notice, WAC 284-43-320(7), Regence gave Dr. Jolley 90 days’ notice of termination. CP 519. Regence again notified Dr. Jolley of his appeal rights and informed him that upon receipt of a request for appeal, Regence would hold the pending termination in abeyance until resolution of the appeal. CP 528.

8. Prior to the Effective Date of the Termination, Dr. Jolley Proceeds Through the Regence Internal Appeals Process.

Dr. Jolley appealed the termination decision, arguing that Regence should not use the conditions imposed on his license by MQAC as a reason for termination because “many Regence providers have conditions on their licenses” and “Dr. Jolley [should be] given the same consideration as other providers in dealing with conditions on a provider’s license.”⁷ CP 239-40. Dr. Jolley also argued that the “the nature of the state disciplinary proceedings” against him “do not justify termination.” CP 438-39. Regence informed Dr. Jolley of the date for review by the Level One Appeal Committee, again invited him to submit any additional information, and confirmed that his Practitioner Agreement would remain in active status until he completed the internal appeals process. CP 443.

The Level One Appeal Committee voted to uphold the termination, CP 245, and Dr. Jolley appealed to Level Two. CP 445-49. Dr. Jolley and his attorney appeared in-person before the Level Two Appeal Committee on March 28, 2005. CP 481-82. The Committee reviewed written materials submitted by Dr. Jolley and his attorney prior to the hearing,

⁷ Note that Dr. Jolley’s October 15, 2004, letter, CP 239-40, disproves his representation to this Court that he did not raise this issue during the internal appeals process because he was ignorant of “the true reasons for his termination.” See *Appellant’s Brief*, pp. 11-12.

including a January 31, 2005, letter in which Dr. Jolley argued for leniency based on the nature of the conditions on his license and his alleged compliance with those conditions. CP 445-46. Dr. Jolley also contended that Regence contracts with other providers who have conditions on their licenses and argued to the committee that he also should be permitted to remain under contract despite the state-imposed conditions on his medical license. *Id.* Dr. Jolley's presentation to the committee included a discussion of his personal circumstances and his position that the conditions imposed by MQAC on his medical license would adequately protect Regence's members from harm. CP 465. Dr. Jolley also submitted letters from a number of families who urged Regence to keep Dr. Jolley in the network. *Id.*

The Level Two Appeal Committee considered all of the documentation submitted and the oral presentations by both Dr. Jolley and his attorney, Mr. Coulson, and it voted to uphold the termination of Dr. Jolley's Practitioner Agreement. CP 465-66. At Dr. Jolley's request, Regence extended the effective date of the termination to August 28, 2005. CP 451.

9. Prior to the Effective Date of the Termination, the Parties Proceed to a Two-Day Arbitration Hearing.

Dr. Jolley demanded arbitration before Commissioner JoAnne Tompkins of Regence's "at will" termination of his Practitioner Agreement. During the arbitration proceeding, Dr. Jolley conducted extensive written and deposition discovery. Regence produced over 2,000 pages of documents and a number of witnesses for deposition. Following this discovery and prior to the arbitration hearing, the arbitrator issued an order rejecting Dr. Jolley's argument that having reasons for its termination decision converted Regence's "at will" termination of Dr. Jolley's Practitioner Agreement into a "for cause" termination and defining the scope of issues as follows:

Thus, the issues for arbitration are whether Dr. Jolley was given a "fair review" of the termination decision and, if not, whether such review would have changed the outcome. The causation element is important as Regence at all times retained the right to terminate Dr. Jolley for any reason not against public policy. Nevertheless, I must conclude that RCW 48.43.055 was enacted so as to give the provider an opportunity to change the health carrier's mind about adverse actions it takes against him. Thus, if Regence failed to provide "fair review," it breached the provider agreement. There are only damages, however, if "fair review" would have, in fact, changed Regence's mind. If Regence would have terminated Dr. Jolley even after fully hearing his side of things, there may be a breach of the provider agreement, but no damages.

CP 453-56.

Subsequently, Regence again gave Dr. Jolley the opportunity to provide any statements, documents or other materials that support his position that Regence should not terminate his Practitioner Agreement. CP 461-62.

The parties proceeded to a two-day arbitration hearing on July 27 and 28, 2005. Following the hearing, the arbitrator issued an order finding in favor of Regence on all issues and explaining:

I was persuaded by a clear preponderance of the evidence that Dr. Jolley received a fair review of his termination. He was given appropriate notice with adequate specificity, multiple opportunities to present his case, multiple reviews by fair and impartial review panels and an outcome that was consistent with Regence policy and practice. I further conclude on a clear preponderance of the evidence that the additional information that was presented on behalf of Dr. Jolley during this hearing (specifically the Santé and Meadows records and Dr. Jolley's testimony) would not have changed the outcome at either Regence appeal level.

I further find that Dr. Jolley failed to prove that his [second] termination was retaliatory, that there was a violation of public policy, or that there was a violation of the Consumer Protection Act.

CP 458-59.

Following both levels of internal appeal and the arbitration hearing, Regence terminated Dr. Jolley's Practitioner Agreement effective August 28, 2005.

10. The Court of Appeals Holds the Arbitration Proceeding Is Non-Binding, and Dr. Jolley Files the Instant Litigation.

The King County Superior Court reduced the arbitrator's decision to judgment, and Dr. Jolley appealed to Division One of the Washington State Court of Appeals. CP 766-69. Dr. Jolley argued the arbitrator's rulings were not binding, and he had a right to trial de novo based on WAC 284-43-322, which provides that although health carriers "may require alternative dispute resolution prior to judicial remedies," they "may not require alternative dispute resolution to the exclusion of judicial remedies." Before Dr. Jolley filed his appeal, both Divisions One and Two of the Washington State Court of Appeals had rejected this argument, ruling that judicial review of arbitration decisions involving disputes between providers and health carriers was limited to the review permitted under the federal and state arbitration acts. *Tacoma Orthopaedic Surgeons, Inc. v. Regence BlueShield*, 2005 WL 45551 (Wn. App. Div. II; Jan. 11, 2005); *Kruger Clinic Orthopaedics, LLC v. Regence BlueShield*, 123 Wn. App. 355, 98 P.3d 66 (Div. I; Sept. 20, 2004).

Subsequently, and while Dr. Jolley's appeal was pending, the Washington State Supreme Court overruled the decisions of Divisions One and Two, holding that RCW 48.43.055 and WAC 284-43-322 prohibit health carriers "from imposing on health care providers a binding

form of dispute resolution.” *Kruger Clinic Orthopaedics, LLC v. Regence BlueShield*, 157 Wn.2d 290, 306, 138 P.3d 936 (July 13, 2006). The Supreme Court held that although Washington law permits health carriers to require providers to submit disputes to arbitration, only non-binding arbitration is allowed. *Id.*

Division One of the Court of Appeals rejected Regence’s position that Dr. Jolley’s case was distinguishable from *Kruger* because, unlike the providers in the *Kruger* case who objected to arbitration, Dr. Jolley affirmatively demanded arbitration, both parties proceeded to arbitration under the assumption that the arbitrator’s decision was binding, and Dr. Jolley did not complain about the arbitrator’s authority to issue binding decisions until after he received an unfavorable ruling. *Jolley v. Regence BlueShield*, 2007 WL 1733215 (Wn. App. Div. I; June 18, 2007).

B. Trial Court Procedural History.

Dr. Jolley then filed the instant litigation, contending Regence breached the Practitioner Agreement by not giving him “fair review” of its decisions to terminate the Agreement. CP 1-9. In light of the Court of Appeals’ ruling that the arbitration proceedings were not binding, Regence filed a counterclaim for return of the \$28,403.00 it paid under the belief that the arbitrator’s ruling of August 13, 2005, was binding (*see* discussion, Section III.A.6). CP 8-9.

Dr. Jolley moved for summary judgment, asking the trial court to rule as a matter of law that Regence failed “to provide [him] a fair termination and appeal process.” CP 350. Regence filed a cross-motion for summary judgment, seeking dismissal of Dr. Jolley’s claims because the undisputed evidence proves that Dr. Jolley received “fair review” of the terminations of his Practitioner Agreement. CP 355-81.

The trial court agreed with the parties that the facts in this case are undisputed and ruled as a matter of law that under those undisputed facts, Dr. Jolley received “fair review” of Regence’s decisions to terminate his Practitioner Agreement. CP 605-7. Judge Susan Serko found that Dr. Jolley received not just one but multiple “fair reviews,” and he “had a full and fair opportunity to have all issues reviewed by Regence and by a neutral fact finder.” RP 27:2-6. As an alternative basis to grant summary judgment, the Court held that even if Dr. Jolley had not received fair review, he could not prove causation because he could not establish that any alleged deficiency in the process made a difference. Dr. Jolley could not articulate any arguments or evidence that he did not previously submit to Regence that would have altered the outcome of the internal appeals process, and Dr. Jolley was and remains ineligible for a Regence contract because of his suspension from Medicaid programs. RP 27:11-17. Finally, Judge Serko rejected Dr. Jolley’s argument that her ruling merely

adopted the arbitrator's findings, noting: "I am not finding that [the] arbitrator's decision is binding. I'm simply finding that collectively all those processes together were fair review." RP 31:12-14.

Subsequently, the parties filed cross-motions addressing Regence's counterclaim for return of the \$28,403.00 awarded by the arbitrator to Dr. Jolley as damages for the October 2003 termination, and paid by Regence under a belief that the arbitration was binding (see discussion Section III.6). CP 709-13, 772-75. Dr. Jolley argued that he should be entitled to keep the money because the arbitration proceedings were part of the "fair review" of his contract termination. CP 713. The trial court agreed with Dr. Jolley's position (although she noted that it was inconsistent with his previous argument to the Court of Appeals that the arbitrator's rulings were not binding), and she dismissed Regence's counterclaim. CP 792-93.

Dr. Jolley then appealed the dismissal of his claims. CP 696.

IV.

ARGUMENT

A. The Trial Court Properly Granted Summary Judgment to Regence.

On review of an order granting summary judgment, the Court of Appeals performs the same inquiry as the trial court. *Hisle v. Todd Pac.*

Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate if “after viewing the pleadings and record, and drawing all reasonable inferences in favor of the non-moving party, [the court] finds there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Mayer v. Pierce Cy. Med. Bur., Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1996). The Court of Appeals may affirm on any basis supported by the record. *Fabrique v. Choice Hotels Int’l, Inc.*, 144 Wn. App. 675, 682, 183 P.3d 1118 (2008).

A defendant in a civil action is entitled to summary judgment when that party shows there is an absence of evidence supporting an element essential to the plaintiff’s claim. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The defendant may support the motion by merely challenging the sufficiency of the plaintiff’s evidence as to any such material issue. *Id.* at 226. In response, the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. *Id.* at 225-26. Any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements, or argumentative assertions. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Here, the parties agree that the evidence is undisputed, but disagree about the legal significance of that evidence. As found by the trial court, the undisputed evidence establishes that Dr. Jolley received “fair review” of Regence’s decisions to terminate his Practitioner Agreement.⁸ For each termination, Dr. Jolley received notices of the reasons underlying the termination, he received multiple levels of review both by practicing peers and by company management, both he and his attorney had the opportunity to present Dr. Jolley’s position in person to Regence, Dr. Jolley conducted extensive document and deposition discovery of Regence, and the parties went through arbitration hearings.⁹ Under these circumstances, the trial court properly granted summary judgment dismissal of Dr. Jolley’s claims.

⁸ Dr. Jolley’s claims in this matter rest on alleged procedural violations; he does not deny that Regence had the substantive right to terminate his Practitioner Agreement. See WAC 284-43-320(7) (health carrier is entitled to terminate provider agreement without cause on 60 days’ written notice); see also *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 756-57, 748 P.2d 621 (1988) (alleged bad faith in terminating contract was irrelevant because “under the rule that contracts shall be enforced according to their terms . . . neither cause nor good faith is required before the agreement may be terminated”); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984) (an employer can discharge an at will employee for “no cause, good cause or even cause morally wrong without fear of liability”).

⁹ Although the parties address both the 2003 and 2005 terminations their briefing to this Court, the 2003 termination is not relevant to Dr. Jolley’s claims on appeal because the arbitrator ruled in Dr. Jolley’s favor and awarded damages to Dr. Jolley, Regence paid the damage award, and Dr. Jolley prevailed on his argument to the trial court that he is entitled to keep the damage award.

B. The Trial Court Properly Ruled That Dr. Jolley Received “Fair Review” as a Matter of Law.

RCW 48.43.055 requires health carriers to implement “procedures for review and adjudication of complaints initiated by health care providers” that “provide a fair review for consideration of complaints.” Under the associated regulation, WAC 284-43-322, the procedures must “include a formal process for resolution of all contract disputes,” and the carrier “may require alternative dispute resolution prior to judicial remedies.”

Other than mandating a process, there is no Washington law that imposes any substantive requirements on the nature of the process. However, even if the Court imposes the standard of due process required under the Fourteenth Amendment, the trial court properly held that Dr. Jolley cannot sustain his claim; he received notice of the action to be taken against him and an opportunity to be heard to guard against an erroneous decision by Regence. *Cf. Amunrud v. Board of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (“When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.”), *cert. den.*, 127 S. Ct. 1844 (2007).

The Regence internal appeals process involves multiple levels of review by separate committees. Regence provided Dr. Jolley detailed written instructions on each step of the process and, at each of these steps, invited Dr. Jolley and his attorney to submit any additional information they wanted the company to consider. Dr. Jolley acknowledges Regence considered all of the materials he and his attorney submitted. Pursuant to the terms of his contract, Dr. Jolley also had the opportunity to present his position at a two-day hearing before an arbitrator where he presented live testimony and cross-examined Regence witnesses. Prior to the arbitration hearing, Dr. Jolley pursued extensive document and deposition discovery. Dr. Jolley took full advantage of Regence's dispute resolution process and had multiple opportunities to be heard.

On appeal, Dr. Jolley makes two arguments in support of his position that he did not receive "fair review." First, he contends that Regence did not tell him the reasons for the terminations. Second, he contends that he did not submit certain evidence during the review. As explained below, neither argument is sufficient to sustain Dr. Jolley's claims.

1. Regence Fully Communicated With Dr. Jolley.

Dr. Jolley contends that the reasons for his contract terminations were "a moving target," and Regence did not tell him that the terminations

were based on the state-imposed conditions on his license to practice. *See Appellant's Brief*, p. 10. However, the following evidence proves that Regence informed Dr. Jolley multiple times of the reasons for the terminations, that Regence repeatedly invited Dr. Jolley to address those reasons, and that Dr. Jolley in fact addressed them:

October 2003 Termination

Date	Notification	Record
11/5/03	Dr. Jolley admits Regence told him it is "concerned" about the conditions on his license and asks Regence to reconsider the termination, arguing that the "conditions" do not constitute limitations on Dr. Jolley's license to practice medicine."	CP 143
12/2/03	Regence tells Dr. Jolley: "The decision to terminate was based on Dr. Jolley's failure to meet Regence's credentialing criteria due to certain conditions placed on his license." Regence invites submission of "additional, pertinent information supporting [his] perspective" to the Level Two Committee.	CP 426
12/8/03	At the Level Two hearing, Dr. Jolley and his attorney (Coulson) give oral presentations asserting that the conditions imposed on Dr. Jolley's license will sufficiently protect Regence's members from harm.	CP 464-65, ¶ 4
12/9/03	Regence informs Dr. Jolley: "Having considered all the evidence presented, the Committee has determined you no longer satisfactorily meet our Health Care Practitioner Criteria . . . due to the fact that you have conditions on your license."	CP 474
12/15/03	Dr. Jolley asks for reconsideration of the termination on the ground that the conditions on Dr. Jolley's medical license "apply to Dr. Jolley himself, and not his license."	CP 429

August 2005 Termination

Date	Notification	Record
10/5/04	Regence provides Dr. Jolley with notice of termination under the "at-will" provision of the contract and advises Dr. Jolley the termination is based on the fact that his medical license "has been suspended and stayed with terms and conditions."	CP 518
10/5/04	Dr. Jolley admits he knows Regence is terminating his contract under the "at will" provision "for conditions on my license."	CP 353, ¶ 9
10/15/04	Dr. Jolley appeals the termination decision, arguing that Regence should not use the conditions imposed on his license by MQAC as a reason for termination because "many Regence providers have conditions on their licenses" and "Dr. Jolley [should be] given the same consideration as other providers in dealing with conditions on a provider's license."	CP 239
11/2/04	Dr. Jolley argues that the "the nature of the state disciplinary proceedings" against him "do not justify termination."	CP 438
1/31/05	Dr. Jolley asks Regence for leniency based on the nature of the conditions on his license, his alleged compliance with those conditions, and the fact that Regence contracted with other providers with conditions on their licenses	CP 446
3/28/05	At the Level Two hearing, Dr. Jolley and Mr. Coulson urge the Committee to overturn Regence's termination decision on the ground that Dr. Jolley's behavior that resulted in the imposition of conditions on his medical license is justified by his difficult personal circumstances.	CP 465-67, ¶¶ 5 and 8
7/27-28/05	At arbitration hearing, Dr. Jolley again argues that conditions on his license do not justify termination, and asks arbitrator to find he did not receive fair review.	CP 458-59

Thus, the evidence indisputably proves that Regence gave Dr. Jolley notice (multiple times) that the company's terminations were based on the state's imposition of conditions on his license to practice medicine, that Dr. Jolley and his attorney had several opportunities to address the issue to Regence and the arbitrator, and that Dr. Jolley and his attorney did in fact address the issue to multiple levels of review committees and the arbitrator. Under these circumstances, the trial court properly granted summary judgment dismissal of Dr. Jolley's claim that he did not receive "fair review." *See, e.g., Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 130-34, 847 P.2d 428 (1993) (trial court properly granted summary judgment dismissal of wrongful termination claim; employer was not required to inform employee of the "legal basis for his dismissal," "but merely to give the employee an opportunity to respond to the facts upon which a charge was based, since a post-termination hearing would still be available to address more subtle or complex issues"); *Payne v. Mount*, 41 Wn. App. 627, 636, 705 P.2d 297 (trial court properly dismissed public employee's wrongful termination claim as a matter of law where, although notice "was very general and did not specify the allegation of sexual misconduct," "it is clear that [plaintiff] knew why he was being dismissed . . . and there is no evidence to support the

conclusion, that he believed that he was being discharged for any reason other than the alleged sexual abuse of his stepdaughter”), *rev. denied*, 104 Wn.2d 1022 (1985).

As an alternative argument, Dr. Jolley contends that an “at will” termination, such as Regence’s August 2005 termination of his Practitioner Agreement, is unfair unless the terminating party has no reason for its decision. *Appellant’s Brief*, pp. 20-21. Dr. Jolley cites no legal support for his argument that an “at will” termination requires a complete absence of reason, and the trial court properly rejected this argument.

2. Dr. Jolley Received Numerous Opportunities to Be Heard.

Dr. Jolley also argues that the process was unfair because he did not have the opportunity to present (1) “evidence establishing that several Regence providers were credentialed despite conditions on their licenses;” or (2) “testimony of Dr. Douglas Diekema regarding the evolution of Washington’s regulations on physician relationships with key third parties.” *See Appellant’s Brief*, p. 12. Again, however, the undisputed evidence completely eviscerates Dr. Jolley’s position.

Dr. Jolley’s contention that he was denied the opportunity to argue that he should be treated the same as 16 other providers “credentialed by

Regence, despite conditions on their licenses” fails because the contention is based on supposition, not fact, and because Dr. Jolley and Mr. Coulson had the opportunity and did in fact make this argument during the appeals process. *See Appellant’s Brief*, p. 21. Of the 15 (not 16) providers identified, eight are not under contract with Regence, six do not have restrictions on their licenses, and the remaining provider is not credentialed by Regence. CP 488. Moreover, Dr. Jolley and his attorney made this argument to both the Level One and Level Two Appeal Committees prior to the effective date of his termination. CP 239-40 (prior to Level One review, Dr. Jolley argued that “many Regence providers have conditions on their licenses” and he should be “given the same consideration as other providers in dealing with conditions on a provider’s license”), CP 446 (prior to Level Two review, Dr. Jolley argued that “Regence has in fact allowed practitioners to continue contracting with Regence, despite conditions on their professional licenses”). Regence rejected Dr. Jolley’s arguments in part because of the severity of the conditions on his license (imposed for a minimum ten-year period and involving behavior of a sexual nature), the fact that Dr. Jolley had previously been disciplined for the same behavior, and Dr. Jolley’s 20-year history of admitted misconduct. CP 467-68, 487-88. Indeed, Regence has never contracted with another provider with such severe

restrictions on his or her medical license. CP 488. During the arbitration hearing, Dr. Jolley conducted voluminous written and deposition discovery on this subject, and made the same arguments to the arbitrator. (Note that Dr. Jolley's "evidence" of the alleged 16 other providers contracted despite conditions on their licenses was originally submitted to the arbitrator. CP 488.) Thus, Dr. Jolley not only had the opportunity to be heard on this issue; he was in fact heard.

Dr. Jolley's argument that he was not able to submit the testimony of Dr. Douglas Diekema is equally unavailing. First, the trial court erred when it denied Regence's motion to strike Dr. Diekema's alleged testimony, because it was submitted only in the form of hearsay statements by Dr. Jolley's attorney.¹⁰ RP 13:5-15; *see Grimwood*, 110 Wn.2d at 359 (affidavit submitted on summary judgment must be based on personal knowledge admissible at trial). Second, Dr. Jolley failed to establish the relevance of Dr. Diekema's alleged testimony, which apparently did not even address Dr. Jolley's dispute with Regence. Finally, Dr. Jolley failed to prove that he was prohibited from submitting Dr. Diekema's testimony either to the Regence appeal committees or to the arbitrator.

¹⁰ Dr. Jolley did not submit any direct testimony from Dr. Diekema, but only his attorney's repetition of alleged statements by Dr. Diekema. CP 544. Dr. Jolley's representation that the trial court "ignored this evidence" is false. *See Appellant's Brief*, p. 35.

The undisputed evidence demonstrates that Dr. Jolley had more than ample notice and numerous opportunities to be heard. He was capably represented by counsel throughout the process, and he cannot produce evidence of any legal deficiency in the process accorded to him. His claim that he did not receive “fair review” fails as a matter of law, and the trial court properly entered summary judgment dismissal.

C. **Dr. Jolley Cannot Prove That Any Alleged Unfairness In the Process Changed the Outcome.**

The trial court properly found, as an alternative basis for dismissal, that Dr. Jolley cannot prove that any alleged deficiency in the process affected the outcome. A plaintiff asserting procedural due process violations “must prove that if proper procedures had been followed, he would not have suffered injury.” *Jaworski v. Rhode Island Board of Regents for Educ.*, 530 F. Supp. 60, 66 (D. R.I. 1981) (citing *Carey v. Phiphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)); *see also Alston v. King*, 231 F.3d 383, 386 (7th Cir. 2000) (“where the employer can prove that the employee would have been terminated even if a proper hearing had been given, the terminated employee cannot receive damages stemming from the termination in an action for a procedural due process violation”).

Despite his numerous complaints about the processes, Dr. Jolley cannot articulate how any alleged deficiency impacted the outcome. He acknowledges that Regence had “discretion as to whether he may continue as a Regence provider despite conditions on his license.” *Appellant’s Brief*, p. 21. As discussed previously, in light of the severity of the conditions, and Dr. Jolley’s admitted history of non-compliance with ethical standards and previous disciplinary action, Regence justifiably stands by its decision to terminate his Practitioner Agreement. *See* CP 467-68, 487-88.¹¹

D. Dr. Jolley Is Not Currently Eligible to Contract With Regence.

Dr. Jolley’s claims also fail as a matter of law because he is not currently and has not been since October 20, 2003, eligible to contract with Regence. Dr. Jolley’s Practitioner Agreement prohibits providers who are expelled or suspended from Medicare or Medicaid programs from contracting with Regence:

This Agreement shall terminate immediately upon the suspension, revocation or nullification of the Practitioner’s license to practice medicine in the state(s) where the Practitioner practices. It shall also terminate immediately in the event the Practitioner is convicted of a felony or is

¹¹ The fact that another health carrier may have decided – in its discretion – to contract with Dr. Jolley is wholly irrelevant to Dr. Jolley’s claims against Regence. *Appellant’s Brief*, pp. 33-34. Dr. Jolley does not submit the terms of his contract with the other provider or the circumstances of the other provider’s decision whether to terminate him from its network.

expelled or suspended from the Medicare or Medicaid programs.

CP 82, ¶ 7.5.

Effective October 20, 2003, DSHS terminated Dr. Jolley's core agreement and suspended his participation in Medicaid and other state-funded medical care programs. CP 509-12. Dr. Jolley remains suspended from participation in these state-administered programs. CP 487, ¶ 3, 514.

Thus, even if Dr. Jolley were under contract with Regence, his suspension from Medicaid programs would operate to "terminate [the contract] immediately." CP 82, ¶ 7.5. Dr. Jolley's ineligibility to be under contract with Regence since October 20, 2003, by itself supports summary judgment dismissal of his claims. *See, e.g., Patterson v. Portch*, 853 F.2d 1399, 1407-8 (7th Cir. 1988) (court refused to order reinstatement because although the plaintiff's procedural due process rights were violated, he was "unfit" for the position in 1979 and still "unfit" at the time of the court's decision and, therefore, reinstating him would put him in a better position that he would have been in if his procedural due process rights had not been violated).

E. The Trial Court Properly Dismissed Dr. Jolley's Consumer Protection Act Claim.

The trial court properly dismissed Dr. Jolley's claim under the Consumer Protection Act ("CPA"), finding Dr. Jolley cannot prove that

Regence's conduct was (1) unfair or deceptive, (2) occurred in the conduct of trade or commerce, (3) affected the public interest, and (4) caused damages. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).

Dr. Jolley has not alleged any *per se* violations of the CPA. Accordingly, he must establish that Regence "engaged in an unfair act or practice which has a capacity to deceive a substantial portion of the public." *Henery v. Robinson*, 67 Wn. App. 277, 290, 834 P.2d 1091 (1992) (citing *Hangman Ridge*, 105 Wn.2d at 786 and holding trial court erred as a matter of law in finding CPA violation), *rev. den.*, 120 Wn.2d 1024 (1993). Ordinarily, a breach of contract "affecting no one but the parties to the contract is not an act or practice affecting the public interest." *Hangman Ridge*, 105 Wn.2d at 790; *see also Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 439, 40 P.3d 1206 (2002) (affirming trial court's summary dismissal of CPA claim where plaintiff failed to prove accounting firm's actions "had the capacity to deceive or deceived anyone other than [the plaintiff]"). Further, many cases have dismissed CPA claims asserted by non-consumer plaintiffs, such as Dr. Jolley, who allege breach of commercial contracts. *See, e.g., Hangman Ridge*, 105 Wn.2d at 794 (holding public interest element not met in part because plaintiffs "had a history of

business experience” and were “not representative of bargainers subject to exploitation and unable to protect themselves”); *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 703, 754 P.2d 1262 (trial court properly dismissed CPA claim against real estate broker where the buyers “had sufficient sophistication to remove them from the class of bargainers subject to exploitation”), *rev. den.*, 111 Wn.2d 1014 (1988); *Goodyear Tire v. Whiteman*, 86 Wn. App. 732, 744-45, 935 P.2d 628 (1997) (trial court properly dismissed CPA claim because tire company’s misrepresentation to several of its commercial dealers “was not directed at the public” and dealers “were better able than the average consumer to judge for themselves the risks . . . [and] are not representative of bargainers vulnerable to exploitation”), *rev. den.*, 133 Wn.2d 1033 (1998); *The Segal Company (Eastern States), Inc. v. Amazon.com*, 280 F. Supp. 2d 1229, 1234, n. 5 (W.D. Wash. 2003) (“[T]he [Washington] Legislature passed the CPA to shield the regular consumer from deception. The statute does not provide extra protection for those individuals who, like plaintiffs, have ‘sufficient sophistication to remove them from the class of bargainers subject to exploitation.’”) (emphasis in original).

Dr. Jolley also fails to allege any unfair practice by Regence that has the capacity to deceive a substantial portion of the public. He does not contend that the Practitioner Agreement itself is unfair or that Regence’s

appeal procedures are unfair, but only that he was treated unfairly under the particular circumstances alleged. (In fact, one of his arguments is that he was treated unfairly because he was not treated like other providers.) Dr. Jolley is a sophisticated litigant who was aggressively represented by counsel throughout the process.

The trial court also properly found a lack of causation for the reasons outlined in Sections IV.C and D, above. Dr. Jolley's CPA claim was properly dismissed as a matter of law.

F. The Trial Court Conducted an Independent Review of the Evidence Prior to Ruling on Summary Judgment.

Finally, Dr. Jolley argues that the trial court "adopted the arbitrator's findings of fact in its determination that Dr. Jolley received a fair review" and, therefore, he was deprived of his right to a "judicial remedy." *Appellant's Brief*, p. 32. But "judicial remedy" does not require that the Court rule in the complainant's favor, only that the Court review the matter *do novo* while recognizing that it is not bound by the arbitrator's decision.

Judge Serko expressly recognized she was not bound the arbitrator's prior decision, and she specifically rejected Dr. Jolley's argument that she could not rule in Regence's favor otherwise. *See* RP 31:12-14 (Judge Serko noted: "I am not finding that [the] arbitrator's

decision is binding. I'm simply finding that collectively all those processes together were fair review.”). The trial court carefully considered all of the evidence and arguments submitted by the parties on the cross-motions for summary judgment, and she correctly ruled based on that evidence that Dr. Jolley received fair review of Regence’s termination of his Practitioner Agreement. The Court was entitled to disagree with Dr. Jolley’s position without depriving him of a “judicial remedy.”

G. Regence Is Entitled to an Award of Attorneys’ Fees on Appeal.

Regence requests an award of attorneys’ fees on appeal pursuant to RAP 18.1 and RCW 4.84.330, in light of the provision in the Practitioner Agreement granting an award of fees to the prevailing party. CP 81.

V.

CONCLUSION

The trial court properly rejected Dr. Jolley’s position that he did not receive “fair review.” Simply saying that something is so, even repeatedly, does not make it so, and Dr. Jolley’s position is completely devoid of factual support.

Under the undisputed facts in this case, the trial court properly found that Dr. Jolley received fair review of the October 2003 and August 2005 terminations of his Practitioner Agreement. For each termination, Regence fully informed Dr. Jolley of the bases for the terminations, and

Dr. Jolley had the opportunity to present his position to multiple Regence committees and to an arbitrator. Alternatively, even if Dr. Jolley could articulate a deficiency in the review process, he failed to establish that any such deficiency made a difference in the outcome.

The trial court properly dismissed Dr. Jolley's claims against Regence in this matter, and Regence asks this Court to affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 15th day of December,
2008.

MILLS MEYERS SWARTLING
Attorneys for Respondent
Regence BlueShield

By  _____
Stephania Camp Denton
WSBA No. 21920

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that I filed and served the
RESPONDENT'S BRIEF by sending the document by messenger to the
following on today's date:

Clerk of the Court
Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

and a copy of the document to:

Edward R. Coulson
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1111 Third Avenue, Suite 3400
Seattle, WA 98101

DATED this 15th day of December, 2008.

MILLS MEYERS SWARTLING
Attorneys for Respondent



Stephania Camp Denton
WSBA No. 21920

CO. REC'D 15 DEC 15 11:15
STATE OF WASHINGTON
BY _____ DEPUTY
COURT OF APPEALS