

COA# 306577

No. 86177-3

SUPREME COURT OF THE STATE OF WASHINGTON

VENKATARAMAN SAMBASIVAN,
an individual,

Appellant,

vs.

KADLEC MEDICAL CENTER, a
corporation,

Respondent.

BRIEF OF APPELLANT

Michael E. de Grasse
Counsel for Appellant
WSBA #5593

P. O. Box 494
59 South Palouse Street
Walla Walla, Washington 99362
509.522.2004

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INTRODUCTION

This case starkly presents the questions whether a hospital may avoid claims of breach of contract, tortious interference with business expectancies and unlawful discrimination by asserting "patient safety," and the "peer review privilege."

Venkataraman Sambasivan is a well-qualified member of Kadlec's medical staff who was stripped of his privileges to practice interventional cardiology by the Kadlec board of directors in August, 2008. Kadlec prevailed in the trial court mainly by arguing that its board of directors had plenary authority to decide all questions concerning clinical privileges, notwithstanding and in violation of certain medical staff bylaws provision of rights to

physicians.

In Dr. Sambasivan's view, the medical staff bylaws provision of certain due process rights and rights against discrimination are enforceable against Kadlec. Though a hospital board may determine what privileges its medical staff members may hold, it may not use "patient safety" as a shibboleth to abrogate rights provided by its medical staff bylaws to physicians like Dr. Sambasivan.

In a claim related to his breach of contract claim, Dr. Sambasivan sued for unlawful discrimination. Although unlawful discrimination is an exception to statutory limits on claims that may arise from improper medical peer review, Dr. Sambasivan was denied discovery of peer review materials. (Appendix CP 71) This case presents the question whether the peer review privilege bars discovery with respect to claims of unlawful discrimination. In Dr. Sambasivan's view, the trial court erroneously denied him discovery of peer review material by an erroneous application of peer review privilege statutes. (RCW 4.24.250(1) and RCW 70.41.200(3)).

Dr. Sambasivan seeks reversal of the trial court. This case should be remanded so he may

proceed with his claims of breach of contract,
tortious interference with business expectancies
and retaliation. Dr. Sambasivan should also
be allowed discovery of peer review materials
in aid of his discrimination claim.

ASSIGNMENTS OF ERROR, ISSUES
PERTAINING THERETO AND STANDARD OF REVIEW

Assignments of Error

1. The trial court erred by granting summary judgment for Kadlec dismissing with prejudice Sambasivan's breach of express contract claim. (CP 893)
2. The trial court erred by granting summary judgment for Kadlec dismissing with prejudice Sambasivan's tortious interference claim. (CP 893-894)
3. The trial court erred by granting summary judgment for Kadlec dismissing with prejudice Sambasivan's retaliation claim. (CP 894)
4. The trial court erred by denying Sambasivan's motion to compel discovery. (CP 72)
5. The trial court erred by awarding attorney fees, costs and expenses to Kadlec. (CP 893)

Issues Pertaining Thereto

1. Whether as a matter of law and on indisputable facts, Kadlec is entitled to summary judgment dismissing with prejudice Sambasivan's breach of express contract claim.

2. Whether as a matter of law and on indisputable facts, Kadlec is entitled to summary judgment dismissing with prejudice Sambasivan's tortious interference claim.

3. Whether as a matter of law and on indisputable facts, Kadlec is entitled to summary judgment dismissing with prejudice Sambasivan's retaliation claim.

4. Whether the trial court's denial of Sambasivan's motion to compel discovery was legally erroneous.

5. Whether the trial court's award of attorney fees, costs and expenses to Kadlec was legally erroneous.

Standard of Review

All rulings of the trial court to which

error has been assigned should be reviewed de novo.

With respect to the grants of summary judgment, review on appeal is de novo. Herron v. Tribune Pub. Co., Inc., 108 Wn. 2d 162,169, 736 P. 2d 249 (1987).

Review of the order denying Sambasivan's motion to compel discovery is a matter of statutory interpretation. Therefore, review is de novo. State v. Parada, 75 Wn. App. 224, 229, 877 P. 2d 231 (1994).

With respect to the award of attorney fees, costs and expenses, no factual issues are presented. Where, as here, the issues are "solely questions of law," review is de novo. Tunstall v. Bergeson, 141 Wn. 2d 201,209-210, 5 P. 3d 691 (2000).

STATEMENT OF THE CASE

Nature of the Case

Venkataraman Sambasivan is a duly licensed and practicing physician with an office in Pasco. (CP 541,542) He is a native of India and a person of color. (CP 544) He is board certified in internal medicine, cardiovascular disease, interventional cardiology, nuclear medicine, endovascular medicine and vascular medicine. (CP 542) For the past several years, Dr. Sambasivan has been actively practicing the medical specialty of cardiology and the subspecialty of interventional cardiology which entails such procedures as angioplasty and stent placement. (CP 541) Dr. Sambasivan's practice has been full and successful. (CP 542) He is well regarded by his colleagues. (CP 542,543,596) He has never been the subject of a medical malpractice claim that resulted in a monetary payment by him, or a ruling adverse to him. (CP 542)

Notwithstanding Dr. Sambasivan's record of good practice, Kadlec's administration repeatedly

acted adversely to him. As noted by James Hazel, M.D., a former chief of Kadlec's medical staff, the "medical staff was getting a tremendous amount of pressure from hospital Administration to do some [sic] something to essentially suspend Dr. Sambasivan." (CP 631:19-22) In Dr. Hazel's view, Dr. Sambasivan was treated unfairly by Kadlec's administration, and, among other things, "was scrutinized under a microscope dramatically more so for relatively minor infractions than other practitioners were." (CP 630:21-23).

Having suffered adverse actions concerning his privileges, as well as unfair refusals to pay for call coverage, Dr. Sambasivan sued Kadlec for damages. (CP 544-548) In Dr. Sambasivan's view, he had been treated unfairly, and in violation of the medical staff bylaws. (CP 544) Dr. Sambasivan also believed that Kadlec had unlawfully discriminated against him on grounds of national origin, color or ethnicity. (CP 544)

Dr. Sambasivan's initial complaint was

filed in June, 2008. (CP 3) It contained six claims: for breach of contract; for unjust enrichment based on Kadlec's failure to compensate Dr. Sambasivan for providing call coverage; for intentional interference with business expectancy; for unlawful discrimination; for unlawful restraint of trade; for monopolization. (CP 3-9)

Dr. Sambasivan amended his complaint to seek injunctive relief in October, 2008, after the Kadlec Board stripped him of his privileges to practice interventional cardiology. (CP 19,27)

After Dr. Sambasivan's discovery efforts were rebuffed (CP 72), he amended his complaint a second time. The second amended complaint contained four claims: an express contract claim arising from reductions in privileges; an unjust enrichment claim arising from Kadlec's refusal to compensate Dr. Sambasivan for call coverage; a tort claim; and a claim of unlawful discrimination based on retaliation. (CP 74-80).

The second amended complaint modified the formal discrimination claim of disparate treatment

with a claim that Kadlec stripped Dr. Sambasivan of his privileges to practice interventional cardiology in retaliation for his initial complaint of discrimination. (CP 79) The breach of contract claim was elaborated to include a citation to the medical staff bylaws antidiscrimination provision. (CP 75)

Course of Proceedings

Contrary to Kadlec's assertion in its answer to Dr. Sambasivan's statement of grounds for direct review, Dr. Sambasivan did not sue Kadlec "after its Board of Directors ('Board') adopted a minimum 'proficiency threshold' that applies to all cardiologists who perform interventional cardiology procedures at Kadlec." (Answer to Statement of Grounds for Direct Review, 1; footnote omitted) Rather, Dr. Sambasivan sued Kadlec for damages on grounds of breach of contract, unjust enrichment, unlawful discrimination and related claims in June, 2008, before Kadlec stripped him of his privileges to practice interventional cardiology. (CP 3) The so-called "proficiency threshold" was adopted in August, 2008, and effectively reduced Dr. Sambasivan's privileges. (CP 450)

After the trial court upheld Kadlec's refusal to allow discovery of certain peer review materials

necessary to support Dr. Sambasivan's claim of unlawful discrimination (CP 72), Dr. Sambasivan filed a second amended complaint. Each of the four claims in that complaint were attacked on motions for partial summary judgment. Kadlec prevailed on all but the unjust enrichment claim arising from Kadlec's refusal to compensate Dr. Sambasivan for providing call coverage. (CP 893-894)

A bench trial of Dr. Sambasivan's unjust enrichment claim was held on May 10 and 11, 2010. The plaintiff prevailed. Among other findings of fact, were these (CP 881:5-20):

31. When Christopher Ravage, M.D. resumed his practice of certain procedures of interventional cardiology on the defendant's staff in April, 2005, the defendant immediately offered him a written contract which he accepted following which the defendant began paying Dr. Ravage for providing call service.

32. When the plaintiff was placed on the on call list and began providing certain cardiological services in July, 2005, he was not offered a contract by the defendant. The plaintiff was not paid for providing his services. The plaintiff was treated unfairly.

33. In several instances, the defendant paid physicians retroactively

for providing call coverage, but, in this instance, the defendant has refused to pay the plaintiff retroactively for providing call coverage for the period July 1, 2005, until October 21, 2006. The defendant has treated the plaintiff unfairly.

On his unjust enrichment claim, Dr. Sambasivan was awarded damages in the amount of \$74,000, with prejudgment interest in the amount of \$38,650, as well as costs, attorney fees and expenses. (CP 884)

The parties disputed findings and conclusions to be entered by the trial court, as well as respective awards of attorney fees. Final judgment was entered on May 26, 2011. (CP 891) Dr. Sambasivan recovered damages, prejudgment interest, attorney fees, costs and expenses. Kadlec recovered attorney fees and expenses. Kadlec was awarded a net judgment of \$17,821.58. (CP 892) The instant appeal and a cross-appeal ensued. (CP 895,901)

Statement of Facts

Kadlec is the only facility in the Tri-Cities where the practice of interventional cardiology may be fully engaged. (CP 556) As stated, Dr.

Sambasivan is a board certified interventional cardiologist. (CP 542) In 2008, there were three other interventional cardiologists on the Kadlec staff. (CP 542) Not all were board certified in interventional cardiology, notwithstanding American College of Cardiology guidelines that require a practicing interventionalist to be board certified. (CP 542) Through its requirement that interventionalists perform a minimum number of certain procedures to maintain privileges, Kadlec has concerned itself with some American College of Cardiology (ACC) guidelines. (CP 550) Yet, Kadlec does not require board certification of its interventional cardiologists. (CP 550)

Since coming to the Tri-Cities, Dr. Sambasivan has enjoyed a full and successful practice as an interventional cardiologist. (CP 542) Until August 14, 2008, he held privileges to practice interventional cardiology on the Kadlec medical staff. (CP 542) Prior to the start of the interventional cardiology program at Kadlec, Dr. Sambasivan practiced interventional cardiology, on occasion, at Deaconess Medical Center, and Sacred Heart Medical Center in Spokane. (CP 542) Dr. Sambasivan is well regarded by his colleagues.

(CP 542) A former Kadlec chief of staff, Thomas Rado, M.D., "has no qualms about referring cardiology patients" to Dr. Sambasivan. (CP 596:7-8) In 2007-2009, Dr. Sambasivan served as President of the Medical Staff of Lourdes Health Network. (CP 543) In 2009, he received the Outstanding Physician of the Year Award from the Lourdes Foundation. (CP 543)

Although there have been statements that were critical of the way Dr. Sambasivan handled some cases, and Kadlec has cited those statements in an effort to support certain actions taken against him, those statements are without sound medical foundation. (CP 543) No one with medical expertise has been identified who will opine that Dr. Sambasivan is anything but a competent interventional cardiologist. (CP 543) Indeed, the cardiologist who served as chair of the Kadlec Department of Cardiac Services, Christopher Ravage, M.D., recommended that Dr. Sambasivan's privileges as an interventional cardiologist be continued as part of his application for reappointment in 2006. (CP 543) Dr. Ravage made the same recommendation with respect to Dr. Sambasivan's application for reappointment in 2008. (CP 543)

Dr. Ravage's recommendation was for renewal or continuation of privileges as requested, without conditions or exceptions, on the occasions of reappointment in 2006, as well as 2008. (CP 543)

While Kadlec has found reviewers who questioned Dr. Sambasivan's judgment, his cases have never been found to have breached the governing standard of care. In response to critical remarks from reviewers selected by Kadlec, Dr. Sambasivan had several of his cases reviewed by highly qualified interventional cardiologists, namely, Angelo Ferraro and Peter Demopulos. Drs. Ferraro and Demopulos have found Dr. Sambasivan's management of cases they reviewed to be perfectly competent, and, in some cases, laudable. (CP 543,588,590)

When Dr. Sambasivan's privileges were up for renewal in 2008, Kadlec engaged Robert Duerr, M.D. to review certain cases of all Kadlec interventional cardiologists. (CP 548) The purpose of this review was to provide a basis for acting on Dr. Sambasivan's application for renewal of his privileges to practice interventional cardiology at Kadlec. (CP 548) Dr. Duerr's review was, in Dr. Sambasivan's opinion, medically flawed. (CP 549) Nevertheless, the review was used to develop

a recommendation to the Kadlec board by its Medical Executive Committee that Dr. Sambasivan's privileges be reduced by barring him from performing acute or emergent interventions. (CP 548-549) Despite the clear requirements of the medical staff bylaws, and Kadlec's corporate bylaws, Dr. Sambasivan was given no notice or opportunity for a hearing on the recommendation of the Medical Executive Committee to reduce his privileges. (CP 549)

In addition to the recommendation to reduce Dr. Sambasivan's privileges, the Medical Executive Committee recommended that the Kadlec board require interventional cardiologists to perform at least 75 procedures of a certain sort (percutaneous interventions, "PCI") per year to secure privileges to practice interventional cardiology. (CP 550) This recommendation involved certain guidelines of the ACC concerning procedure volume. (CP 550)

The ACC has various recommendations concerning the practice of interventional cardiology. (CP 550) Among other things, it recommends, as a guideline, that interventionalists be required to perform 75 procedures of a certain sort annually. (CP 550) It also recommends that interventionalists be board certified. (CP 550) On August 14, 2008,

the board of directors of Kadlec was given a recommendation by its Medical Executive Committee to adopt the ACC guideline concerning procedure volume. (CP 550) It was not recommended that it adopt the requirement of board certification. (CP 550) At the time, Dr. Sambasivan was board certified in interventional cardiology; not all Kadlec interventionalists were then board certified in interventional cardiology. (CP 550)

The Medical Executive Committee recommended that the volume requirement of 75 cases per year be phased in over a period of years. (CP 550) Departing from this recommendation, the Kadlec board on August 14, 2008, made the 75-case-per-year requirement effective retroactively. (CP 550) As Dr. Sambasivan had not performed 75 procedures of the sort required during the twelve-month period immediately prior to August 14, 2008, his privileges to perform all (not only acute or emergent) interventional procedures were denied. (CP 550)

As stated by Thomas Cowan, the action of the Kadlec board concerning the volume requirement was implemented as described above because the board had "a fear if that were not done, Dr. Sambasivan would cause some injury." (CP 551) In fact, there was no basis in medical science or

practice for that view. As opined by hospital governance expert Dr. Gary Mihalik, the Kadlec board's action with respect to the recommended change in credentialing was contrary to the Kadlec bylaws, national standards of hospital governance as well as standards of the Joint Commission of the Accreditation of Health Care Organizations ("Joint Commission"). (CP 551) In the opinion of Kadlec cardiac services chair Christopher Ravage, M.D., this retroactive implementation was unexpected, unprecedented and unfair to Dr. Sambasivan. (CP 591-592,599-600)

At the time Dr. Sambasivan filed his complaint in June, 2008, he had concluded that he had been the victim of discrimination on the basis of race, ethnicity or national origin. Other non-Indian practitioners seemed to work with much less scrutiny by Kadlec administration of their cases. (CP 553) Only Dr. Sambasivan was not paid for providing cardiology call services. (CP 553) Dr. Sambasivan was subjected to repetitive reviews of his cases. (CP 553) It was never clear to Dr. Sambasivan how his cases were selected for review. (CP 553) It was clear to him that guidelines of the ACC for selection of cases for review were not met by Kadlec. (CP 553)

Although Dr. Sambasivan determined that his capacity to prove unlawful discrimination on the basis of race, ethnicity or national origin was insufficient to meet governing legal standards, his claim of discrimination was made initially on a factual basis and in good faith in June, 2008. (CP 553) Dr. Sambasivan's ability to prove actual discrimination was undercut when his discovery request for peer review materials was denied by the trial court. (CP 72)

Following the Duerr reviews in the spring of 2008, Dr. Sambasivan was the only interventional cardiologist with respect to whom adverse action concerning privileges was considered by Kadlec. Adverse action against Dr. Sambasivan was considered by the Kadlec board despite the fact that at least one other interventionalist, white American, had performed more poorly in Dr. Duerr's view than Dr. Sambasivan. (CP 554) The white American interventionalist was not board certified in interventional cardiology; Dr. Sambasivan was. (CP 554) Therefore, it seemed clear that Dr. Sambasivan was the subject of unlawful discrimination on the basis of race, ethnicity or national origin. (CP 554)

Shortly after Dr. Sambasivan made a claim of

unlawful discrimination, the Kadlec board acted on August 14, 2008, to deny him due process and to strip him of all privileges to practice interventional cardiology. As shown by the minutes of the August 14, 2008, meeting, the discrimination suit that Dr. Sambasivan filed was described to the Kadlec board at that time. (CP 554-55,448)

In Dr. Sambasivan's view, the departure by Kadlec from the recommendations of its Medical Executive Committee was without foundation in logic, standards of hospital governance or medical science. By this process of elimination, Dr. Sambasivan concluded that the true cause of the board actions against him of August 14, 2008, was unlawful discrimination, particularly, retaliation. Subsequent events support Dr. Sambasivan's view. After a bench trial of his claim that Kadlec had unlawfully refused to compensate him for providing call coverage, the trial court found that Kadlec had, in fact, treated Dr. Sambasivan unfairly. (CP 881:5-20)

Much of an interventional cardiologist's practice is a result of work in a hospital with facilities for interventional cardiology like Kadlec's facilities. (CP 556) No other hospital in the Tri-Cities has comparable facilities.

(CP 556) The only place for a full practice of interventional cardiology that is available in the Tri-Cities is Kadlec. (CP 556)

By stripping Dr. Sambasivan of all privileges to practice interventional cardiology as a member of the Kadlec medical staff, he was denied his usual expectancy of patients that flow from performing interventional procedures at Kadlec.

(CP 556) Kadlec knew or should have known that Dr. Sambasivan would lose these business expectancies when it acted as it did on August 14, 2008.

(CP 556) As a consequence of its adverse actions against Dr. Sambasivan, Kadlec caused him to suffer economic and noneconomic damages. (CP 557)

Disposition Below

The trial court entered a final judgment on May 26, 2011, awarding Kadlec \$17,821.58. This sum was the remainder after the awards to Dr. Sambasivan of damages, interest, attorney fees, costs and expenses were subtracted from awards to Kadlec of attorney fees, costs and expenses. (CP 898)

Dr. Sambasivan's claims of breach of express contract, tortious interference with business expectancy and retaliation were dismissed with prejudice on motions for partial summary judgment.

(CP 899,900) The unjust enrichment claim was tried to the bench where Dr. Sambasivan prevailed. (CP 1363,874) Dr. Sambasivan's initial claim of unlawful discrimination was never dismissed or adjudicated. Depending on how certain issues are resolved here, this broader discrimination claim could be restated by amended pleadings pursuant to CR 15(a) or (b).

ARGUMENT

I. THE KADLEC CORPORATE BYLAWS, THE MEDICAL STAFF BYLAWS AND DR. SAM- BASIVAN'S PROFESSIONAL SERVICES CONTRACT PROVIDE RIGHTS OF DUE PROCESS AND AGAINST DISCRIMINATION.

As a member of the Kadlec medical staff, Dr. Sambasivan has certain rights of due process. He also has a right against unlawful discrimination. The medical staff bylaws contain a "Physicians Bill of Rights." (CP 383) Among other things, this bill of rights guarantees a physician a hearing and an appeal in certain cases. (CP 383) These rights are specifically identified in §14.1 of the medical staff bylaws providing that a staff physician like Dr. Sambasivan is entitled to a hearing whenever there is a recommendation that the physician's clinical privileges be reduced or restricted. (CP 434) This hearing right is not nebulous. In fact, the medical staff bylaws contain an elaborate fair hearing plan. (CP 441) A physician's right against unlawful discrimination is no less clear in the medical

staff bylaws:

No applicant for Medical Staff membership or particular clinical privileges shall be discriminated against on the basis of age, sex, race, creed, color, national origin, disability, or any other basis prohibited by law. (CP 388)

Thus, the medical staff bylaws furnish express rights of due process and against unlawful discrimination.

Dr. Sambasivan's rights of due process and against discrimination are binding on Kadlec because they are components of Kadlec's own governing documents, as well as the individual contract between the parties. The corporate bylaws of Kadlec obligate the board of directors to accord due process to Dr. Sambasivan:

XII.4 Due Process. Any action of this corporation's Board of Directors that will serve to deny, revoke, suspend or reduce Medical Staff appointment, membership or clinical privileges shall, except under circumstances for which specific provision is made in the Medical Staff Bylaws, be accomplished in accordance with the Medical Staff's due process provisions then in effect and approved by this corporation's Board of Directors. The Medical Executive Committee shall report to the Board of Directors, from time to time, concerning the

mechanism for due process
procedures. (CP 369)

Reinforcing this unequivocal commitment,
is the text of the medical staff bylaws.

By their own terms, the medical staff
bylaws are binding on Kadlec. By the preamble,
the medical staff bylaws acknowledge the pur-
pose of "rules and regulations for the internal
governance of the Medical Staff." (CP 382) By
an explicit physicians bill of rights, Kadlec
acknowledges the need for rule of law and
due process. (CP 383) This need is made
elaborate and explicit by the fair hearing
plan, a signal component of the medical staff
bylaws. (CP 441) Finally, the adoption section
of the medical staff bylaws shows express
approval and effectiveness of the bylaws with
respect to Kadlec and staff physicians. (CP 440)

The medical staff bylaws are a component
of the professional services contract between
Dr. Sambasivan and Kadlec. At all times material
to this case, the parties had a written contract
whereby Dr. Sambasivan agreed to provide emer-
gency department call coverage as an inter-
ventional cardiologist. That contract expressly

incorporated by reference the medical staff
bylaws:

The Medical Staff Bylaws, rules
and regulations, and definitions
of participation in ED on call
responsibilities, incorporated by
reference; (CP 482)

Thus, by Kadlec's fundamental document of
corporate governance, by the terms of the
medical staff bylaws and by the individual
contract with Dr. Sambasivan, all provisions
of the medical staff bylaws are binding on
Kadlec.

II. BY DENYING DR. SAMBASIVAN A
HEARING ON THE RECOMMENDATION
TO REDUCE HIS CLINICAL PRIVILEGES,
THE KADLEC BOARD OF DIRECTORS
VIOLATED THE MEDICAL STAFF BYLAWS.

As stated by Dr. Sambasivan in his declaration
in opposition to summary judgment:

My privileges at Kadlec were up
for renewal in 2008. I made the
usual application. I thought things
were going well until April or May,
2008, when I learned that my ap-
plication was being subjected to
intense scrutiny. Among other things,
the administration had determined to
select certain cases of all inter-
ventionalists and send them to an
outside reviewer, Robert Duerr, M.D.
Although other interventionalists

had their cases reviewed by Dr. Duerr, the purpose of the review was to provide a basis for acting on my application for reappointment.

At the August 14, 2008, board of directors meeting, the defendant's board was presented with a dishonest and unfair report that was used to support a recommendation from the Medical Executive Committee to remove my privileges to practice acute or emergent interventional procedures. The presentation to the board inaccurately stated that eight cases were reviewed by Dr. Duerr from me. In fact, nine cases were reviewed. Although the reviewer opined that only one of my cases involved a negative impact on a patient, the Board was told that there were two. The comparisons suggested that I was a less skilled practitioner who threatened patients' safety. In fact, this was not true. Indeed, another interventionalist whose cases were part of the Duerr review was found to have a greater percentage of so-called deviations from the standard of care than I was. This information was not conveyed to the Board. Additionally, the only case of mine with respect to which Dr. Duerr concluded there was a negative impact on the patient, had been the subject of internal review by the defendant's medical staff, previously. In fact, there was no negative impact on the patient in that case. I was issued a letter that commended me for my care of that patient. (CP 548:16--549:20)

This misleading use of Dr. Duerr's report is underscored by his own deposition testimony that he had formed no opinion concerning Dr. Sambasivan's

competence as a cardiologist. (CP 794:11-17)
Other experts had formed favorable opinions of
Dr. Sambasivan and his handling of several
cases, including those reviewed by Dr. Duerr.
(CP 567,588,590)

Notwithstanding this lack of logic and
evidence, the Kadlec board of directors was
presented with a recommendation by the Medical
Executive Committee to reduce Dr. Sambasivan's
privileges "so that he is no longer privileged
to perform acute/emergent interventions." (CP 574)
This recommendation entitled Dr. Sambasivan to
a hearing as required by the Kadlec Physicians
Bill of Rights, and specific due process require-
ments of the medical staff bylaws. (CP 383,434)
Yet, no hearing was allowed.

Had Dr. Sambasivan been allowed a hearing
he would have exposed the deficiencies in the
Duerr report, and its use through the testimony
of at least two accomplished interventional
cardiologists, Angelo S. Ferraro, M.D., and
Peter Demopulos, M.D. (CP 581-586;577-579) In
fact, cases reviewed by Dr. Ferraro were the
very cases reviewed by Dr. Duerr. (CP 567:22-23)
Both Drs. Ferraro and Demopulos would likely

have testified, had Dr. Sambasivan been allowed a hearing, that Dr. Sambasivan managed his patients with a proficiency that met or surpassed the governing standard of care. (CP 588, 590)

III. BY RETROACTIVELY REVISING ITS CREDENTIALING REQUIREMENTS, THE KADLEC BOARD OF DIRECTORS STRIPPED DR. SAMBASIVAN OF ALL PRIVILEGES TO PERFORM INTERVENTIONAL CARDIOLOGY, CONTRARY TO ESTABLISHED PRACTICE, MEDICAL SCIENCE, STANDARDS OF HOSPITAL GOVERNANCE, AND IN VIOLATION OF THE MEDICAL STAFF BYLAWS.

In addition to the Medical Executive Committee recommendation to reduce Dr. Sambasivan's privileges, the Kadlec board of directors considered another recommendation on August 14, 2008. As stated in the minutes (CP 574):

Beginning in 2009 in order to be credentialed for interventional cardiology all interventional cardiologists will be required to have a volume of 75 cases per year or 150 during the two year credentialing period.

The impact of this recommendation on practitioners like Dr. Sambasivan was considered by the Medical

Executive Committee at its meeting of August 7, 2008, when the recommended increase was considered:

If a physician currently on staff does not meet that number, they are given one year to make that number. Therefore, if a candidate did not meet the numbers at reappointment in 2009, they would be given until 2010 to get up to that number of cases. (CP 473)

This phased, prospective implementation was recommended to the board on August 14, 2008. (CP 574)

Despite the recommendation of the Medical Executive Committee, the board adopted the increased volume requirement "effective immediately," or, in fact, retroactively. (CP 574) As a consequence of this retroactive effect, the Medical Executive Committee recommendation to reduce Dr. Sambasivan's privileges "would therefore be moot." (CP 575) As Dr. Sambasivan had not met the requisite number of procedures during the period immediately preceding the August 14, 2008, adoption date, he lost all his privileges to practice interventional cardiology at Kadlec. (CP 550:18-25)

Inarguably, Dr. Sambasivan was the intended

target of the Kadlec board action making the increased volume requirement effective retroactively. This fact was confirmed by Kadlec board chair Thomas Cowan who expressed his view that were the increased volume requirement not implemented immediately, competency of cardiologists would suffer. (CP 639:23--640:5) The unprecedented rejection of Medical Executive Committee recommendations, and the concomitant targeting of Dr. Sambasivan were particularly remarkable in the view of former Kadlec chief of staff James Hazel, M.D. (CP 632:10-21) Corroboratively, chief of cardiac services Christopher Ravage, M.D. noted that he had never known a change in credentialing requirements to be "applied retrospectively." (CP 600:16) Dr. Ravage also concluded that the board's retrospective change in credentialing requirements "was unfair to Dr. Sambasivan." (CP 600:18-21)

Contrary to Mr. Cowan's lay opinion, the use of a volume requirement to attack a practitioner like Dr. Sambasivan lacks support in medical science. As stated by interventional cardiologist Angelo S. Ferraro, the Kadlec

board's change in volume requirements was "not medically reasonable." (CP 617:7) Dr. Ferraro unequivocally rejects the view that interventional cardiologists who handle fewer than 75 cases per year are not competent. (CP 622:8) Kadlec's own Erick Isaacson, M.D. did not disagree with an excerpt from an American College of Cardiology journal article that noted: "procedure volume is only a poor substitute for quality and outcome; therefore, it should not be used as a replacement for appropriately risk-adjusted outcomes." (CP 595:15-25) Unfortunately, the Kadlec board was presented with misleading information regarding mortality rates of Dr. Sambasivan's patients, which gave false support to its medically unsound actions of August 14, 2008. (CP 552:21--553:3)

Not only was the Kadlec board's action of August 14, 2008, contrary to its own practice and medical science, but it was also contrary to national standards of hospital governance. As stated by hospital governance expert, Gary Mihalik, M.D.:

What the board did was to take that recommendation and make it retro-

active, which I have never seen done before, and it would be like changing the graduation requirements the day before graduation and telling the students who couldn't graduate from college that they should have been doing different things in their junior and senior year but not having told them what those were. (CP 644;62:9-16)

Like Drs. Hazel and Ravage, Kadlec staff members, who had never seen action of this sort taken by the board before August 14, 2008, Dr. Mihalik, from a national vantage point, had the same view.

The Kadlec board's action raising retroactively the number of a certain type of interventions that a practitioner must have completed to maintain his or her privileges, was an effective termination of Dr. Sambasivan's clinical privileges as an interventionalist. Dr. Sambasivan was allowed no hearing. This action did "serve to deny, revoke, suspend or reduce Medical Staff Appointment, re-appointment, membership or clinical privileges." (CP 369) In accordance with the Kadlec corporate bylaws, Dr. Sambasivan should have been accorded due process. (CP 369) The Kadlec board's action on August 14, 2008 was a reduction of Dr. Sambasivan's clinical privileges. Therefore,

he was entitled to a hearing in accordance with the medical staff bylaws §14.1.1. (CP 434)

IV. BY ITS ADVERSE ACTION AGAINST DR. SAMBASIVAN, THE KADLEC BOARD APPEARS TO HAVE DISCRIMINATED AGAINST HIM IN VIOLATION OF THE MEDICAL STAFF BYLAWS.

As noted above, the medical staff bylaws, §1.4, expressly prohibits certain types of discrimination:

No applicant for Medical Staff membership or particular clinical privileges shall be discriminated against on the basis of age, sex, race, creed, color, national origin, disability, or any other basis prohibited by law. (CP 388)

As stated by Dr. Sambasivan in opposition to summary judgment, the white American interventionist on the Kadlec staff was subjected to less onerous review requirements than was Dr. Sambasivan. (CP 553-554) Therefore, Dr. Sambasivan concluded that he had been the victim of unlawful discrimination. (CP 554)

Unfortunately, Dr. Sambasivan was barred from discovery needed to develop his unlawful

discrimination claim. (CP 51,72) Dr. Sambasivan then modified his initial discrimination claim with an allegation of retaliation. (CP 78-79) An allegation of disparate treatment was retained, but no damages were claimed therefor. (CP 78) With respect to Dr. Sambasivan's breach of express contract claim, the antidiscrimination provision of the medical staff bylaws was specifically alleged as among the contractual obligations undertaken by Kadlec. (CP 75)

After Dr. Sambasivan's initial complaint was filed in June, 2008, the Kadlec board met on August 14, 2008. At that meeting it was informed, apparently for the first time, of Dr. Sambasivan's unlawful discrimination claim. (CP 344) After being so informed and at that very meeting, the board rejected recommendations of its own Medical Executive Committee, and stripped Dr. Sambasivan of all privileges to practice interventional cardiology. (CP 449-450)

While Kadlec has denied any retaliatory motive with respect to its adverse action against Dr. Sambasivan, the temporal proximity of this adverse action, and the news of Dr. Sambasivan's unlawful discrimination claim demands an inference

that the claim caused the adverse action. This inference is only confirmed by later events: the trial court findings that Kadlec treated Dr. Sambasivan unfairly by refusing to pay him for call coverage. (CP 881) In that instance, Kadlec treated Dr. Sambasivan disparately by offering Dr. Ravage (the white American interventionalist) a contract for call coverage and compensation for call coverage while denying Dr. Sambasivan the same beneficial arrangement. (CP 881,546,553-554)

V. DR. SAMBASIVAN'S CLAIM OF BREACH OF EXPRESS CONTRACT ARISING FROM KADLEC'S VIOLATION OF THE MEDICAL STAFF BYLAWS IS SUPPORTED BY LAW, LOGIC AND FACT.

The trial court granted summary judgment dismissing with prejudice Dr. Sambasivan's breach of express contract claim. (CP 868,893) The trial court granted summary judgment citing Group Health Cooperative of Puget Sound v. King County Medical Society, 39 Wn. 2d 586, 237 P. 2d 737 (1951) and Rao v. Board of County Commissioners, 80 Wn. 2d 695, 497 P. 2d 591 (1972). (CP 870) As dicta, the trial court stated that assuming the medical staff bylaws created contractual

obligations, Dr. Sambasivan had failed to "raise a genuine issue of fact to establish a breach of contract." (CP 871:1-3) The trial court also ruled that the failure to allow Dr. Sambasivan a hearing on recommendations of the Medical Executive Committee was of no consequence. (CP 871)

The trial court mistakenly treated Group Health, supra, and Rao, supra, as controlling precedent. The trial court misapprehended the circumstances of Dr. Sambasivan's position with respect to the Kadlec board on August 14, 2011.

Kadlec has repeatedly asserted that its authority in Dr. Sambasivan's case is boundless:

Kadlec. . . has unfettered authority to set eligibility criteria for members of its medical staff. . . . (CP 111): 6-7)

Kadlec's Medical Staff Bylaws are subject to the ultimate plenary authority of the board. . . .(T)he Board may unilaterally change or adopt new provisions at will. (CP 110:17-18,22-23)

The Medical Staff Bylaws do not constitute a binding contract between Dr. Sambasivan and Kadlec. (CP 109: 6-7)

Kadlec relies on Group Health Cooperative v.

King County Medical Society, 39 Wn. 2d 586, 667, 237 P. 2d 737 (1951) and Rao v. Board of County Commissioners, 80 Wn. 2d 695, 497 P. 2d 591 (1972) was the precedential foundation of the foregoing assertions.

Group Health, supra, should have no application here. The plaintiff physicians in Group Health were attacked by the King County Medical Society and its allies because they practiced contract medicine. This Court recognized the discretion of private hospitals "to exclude licensed physicians from the use of their facilities." Group Health, 39 Wn. 2d at 667. The degree of private hospital discretion recognized in Group Health antedates the development of much of the law against discrimination, particularly the law and policy against retaliation. More important, the plaintiff physicians in Group Health, unlike Dr. Sambasivan, were not established members of the Swedish Hospital medical staff. Unlike Dr. Sambasivan, the plaintiffs in Group Health were not deprived of rights guaranteed by medical staff bylaws or the law against discrimination.

Although relied on by the trial court and

cited by Kadlec, Rao v. Board of County Commissioners, supra, does more than reaffirm Group Health.

The plaintiff argues that even a private hospital should not be permitted by the courts to discriminate on the basis of sex or race. If there were the slightest suggestion in the record that the plaintiff's application was tabled because of her sex or race, this proposition would receive our full consideration. Clearly, the denial of an application, based upon such a consideration, would constitute an arbitrary act, and this court would be called upon to reconsider the rule which it announced in Group Health Cooperative of Puget Sound v. King County Medical Soc'y, 39 Wn.2d 586, 237 P.2d 737 (1951), exempting from judicial review actions of private hospitals in excluding licensed physicians from the use of their facilities. Rao, 80 Wn. 2d at 700.

Here, Dr. Sambasivan has made more than the "slightest suggestion" of unlawful discrimination. He has shown he has been treated unfairly. He has shown he has been treated disparately. He has shown a sound basis for a retaliation claim arising from Kadlec's stripping him of privileges in August, 2008.

The absence of support for Kadlec that is seen in the cases is amplified by statute and administrative rule.

Statutory structure governing hospitals requires them to set standards and procedures to be applied "in considering and acting upon applications for staff membership or professional privileges." RCW 70.43.010. This statutory requirement is elaborated and refined in WAC 246-320-125 and 246-320-185 requiring medical staff bylaws that provide for conflict resolution and due process. If Kadlec's contention that its board has discretion unfettered by the bylaws to do as it will is accepted, these provisions of positive law would be nullities. They are not. See: Pedroza v. Bryant, 101 Wn. 2d 226,233-34, 677 P. 2d 166 (1984).

This Court should follow the well reasoned analyses of other jurisdictions recognizing medical staff bylaws as contractual and requiring hospitals to play by their own rules. This Court should follow Bass v. Ambrosius, 185 Wisc. 2d 879, 520 N.W. 2d 625 (Wisc. App. 1994) in which a summary judgment against a black physician who sued a hospital for terminating his staff privileges and for damages under a federal civil rights statute, 42 USC 1981, was reversed. Citing cases, The Wisconsin appellate court embraced the general rule: Bylaws constitute a contract between a hospital and one of its staff physicians. Bass,

520 N.W. 2d at 627.

To hold that a hospital did not have to comply with its bylaws would, of course, render them essentially meaningless. [citing cases] They would then be a catalogue of rules, which, although binding on the medical staff were merely hortatory to St. Luke's [the defendant]--much "sound and fury, signifying nothing." (fn.5, Macbeth, act V, scene V, ll. 27-28) Bass, 520 N.W. 2d at 627.

Wisconsin is not alone in following what has been described as the "better-reasoned view. . . that a hospital's bylaws are an integral part of its contractual relationship with members of its medical staff." Lewisburg Community Hospital, Inc. v. Alfredson, 805 S.W. 2d 756,759 (Tenn. 1991). The position for which Dr. Sambasivan contends has also been described as the "majority view." Lawler v. Eugene Wuesthoff Memorial Hospital Association, 497 So. 2d 1261,1264 (D.C. App. Fla. 1986). Based on Washington Law and persuasive authority, the trial court should be reversed. This conclusion is supported by logic and the factual circumstances presented by Dr. Sambasivan's case.

The limitations on the Kadlec board's power found in the medical staff bylaws cannot be ignored on grounds that the board has plenary authority to

determine questions of eligibility for membership of the medical staff. Indeed, the medical staff bylaws are the way the board has exercised its authority over eligibility.

Though Dr. Sambasivan was denied his hearing rights with respect to the Medical Executive Committee's recommendation to limit his privileges, had the Kadlec board done nothing more than reject that recommendation, Dr. Sambasivan, arguably, would have suffered little harm. But the board did not simply reject the MEC recommendation. Instead, it "mooted" it by transforming the recommendation to increase volume requirements into a direct attack on Dr. Sambasivan. (CP 449-450) Thus, Dr. Sambasivan suffered a constructive reduction in his privileges, if not an explicit reduction, without notice or opportunity to be heard. Moreover, the Kadlec board's action was more harsh and injurious to Dr. Sambasivan than an approval of the initial recommendation. Had he lost at hearing, he would have lost only his privileges to perform acute and emergent interventions; he would not have lost all his privileges as an interventional cardiologist. The conclusion is inescapable: the Kadlec board wanted to strip Dr. Sambasivan of privileges without risking reversal through the hearing process. The Kadlec board's action was exactly that which

the medical staff bylaws purport to protect staff physicians against. The trial court should be reversed.

VI. WHERE, AS HERE, DR. SAMBASIVAN HAS SHOWN THAT KADLEC'S INTENTIONAL CONDUCT INTERFERED WITH HIS ABILITY TO RETAIN AND ATTRACT PATIENTS WHO WOULD CONTRACT WITH HIM FOR MEDICAL SERVICES, HIS TORT CLAIM FOR INTERFERENCE WITH BUSINESS EXPECTANCIES SHOULD NOT BE SUMMARILY DISMISSED.

As shown by the plaintiff's declaration, all elements of the intentional tort of interference with business expectancies have been met..(CP 556) The seminal case of Cherberg v. Peoples Nat'l Bank, 88 Wn. 2d 595,602, 564 P. 2d 1137 (1977) sets forth the elements of this tort: (1) a valid business expectancy; (2) knowledge of the expectancy on the part of the defendant; (3) intentional interference causing a breach or termination of that expectancy; (4) resulting damage. By its groundless and intentional action stripping Dr. Sambasivan of his privileges to practice interventional cardiology, Kadlec, with full knowledge, interfered with Dr. Sambasivan's ability to provide services of interventional

cardiology to future patients. (CP 556) Dr. Sambasivan was damaged. (CP 558-559)

The economic loss rule has no place in this case. The economic loss rule marks a boundary between the law of contracts and the law of negligence. The economic loss rule does not apply where, as here, Dr. Sambasivan's tort claim involves breach of a duty owed by Kadlec that is independent of Dr. Sambasivan's contract claim. Eastwood v. Horse Harbor Foundation, Inc., 170 Wn. 2d 380, 387-388, 241 P. 3d 1256 (2010). The trial court should be reversed.

VII. WHERE, AS HERE, DR. SAMBASIVAN HAS SHOWN, AT LEAST INFERENTIALLY, THAT THE KADLEC BOARD'S ACTION AGAINST HIM WAS CAUSED BY HIS SUIT FOR UNLAWFUL DISCRIMINATION, HIS RETALIATION CLAIM SHOULD NOT BE SUMMARILY DISMISSED.

Dr. Sambasivan, as a person of color and of Indian origin, is protected against retaliation arising from his June, 2008, unlawful discrimination claim. The sources of this protection are found in federal and state statutes. Retaliation claims are cognizable under the federal civil rights act codified as 42 USC 1981. CBOCS West, Inc. v.

Humphries, 553 U.S. 442, 170 L. Ed 2d 864, 128 S. Ct. 1951 (2008). Claims of retaliation are cognizable under Washington State Law, RCW 49.60.210. All these sources of protection apply to Dr. Sambasivan because he is a "person." That Dr. Sambasivan is not a statutory employee of Kadlec matters not. The Washington Law Against Discrimination is not limited to discrimination in the employment setting. Its purpose is to make persons free of improper discrimination in a broad way. Marquis v. Spokane, 130 Wn. 2d 97, 112, 922 P. 2d 43 (1996) Finally, the Kadlec medical staff bylaws Section 1.4 expressly prohibit discrimination of the type alleged by Dr. Sambasivan. (CP 388)

To prove his retaliation claim, Dr. Sambasivan must show that: (1) he engaged in protected activity; (2) Kadlec acted adversely against him; and (3) his protected activity was a substantial factor behind Kadlec's adverse action. Employment discharge cases are analogous to Dr. Sambasivan's case. Stripping clinical privileges from a staff physician is like firing an employee. "Retaliatory motive need not be the principal reason for the discharge." Vasquez v. State, 94 Wn. App. 976, 984-85, 974 P.

2d 348 (1999). The principle recognized in Vasquez concerning causation should be applied here.

That the first and second elements of Dr. Sambasivan's retaliation claim have been established is beyond dispute. As stated in Dr. Sambasivan's declaration (CP 553-554), and as confirmed by findings at trial (CP 881), Dr. Sambasivan had good grounds for the unlawful discrimination suit that he filed in June, 2008. (CP 3,8) By filing suit against Kadlec for unlawful discrimination, Dr. Sambasivan engaged in protected activity. Thus, the first element of his retaliation claim is proved.

Proof of the second element of Dr. Sambasivan's retaliation claim is uncomplicated. On the agenda of the Kadlec board meeting of August 14, 2008, were two recommendations of the Medical Executive Committee. The first recommendation, with respect to which Dr. Sambasivan had a right to a hearing which was never allowed, was to take away Dr. Sambasivan's privileges to perform acute and emergent interventions. (CP 449) The second recommendation was to phase in a credentialing requirement that increased the number of

procedures that must be performed annually to maintain privileges as an interventional cardiologist. (CP 449) The Kadlec board did not accept these recommendations. The Kadlec board did not return these recommendations to the Medical Executive Committee with questions or for further study. Instead, the Kadlec board revised these recommendations on its own, without further medical advice, and without foundation in practice, national standards or medical science. (CP 449-450,550-551,591-592) The recrafted recommendations constituted a direct attack on Dr. Sambasivan, and caused a total loss of all his privileges to practice interventional cardiology. (CP 550) Adverse action equivalent to discharge in an employment setting has been shown.

The adverse action by the Kadlec board against Dr. Sambasivan was caused by his unlawful discrimination suit. At a minimum, it must be inferred that "retaliation was a substantial factor behind" the adverse action. Vasquez, 94 Wn. App. at 984. The Kadlec board radically revised recommendations by the Medical Executive Committee after it was advised of Dr. Sambasivan's

unlawful discrimination suit. In fact, the Kadlec board was told of Dr. Sambasivan's unlawful discrimination suit in the same meeting in which it stripped Dr. Sambasivan of his privileges to practice interventional cardiology. (CP 448,344)

Retaliatory intent should be inferred where, as here, the adverse action closely followed the defendant's awareness of the protected activity.

Moreover, we have held that evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant. Miller v. Fairchild Industries, Inc., 885 F. 2d 498,505 (9th Cir. 1989)

In the analogous employment setting, a retaliation suit may not be dismissed if it is shown that an employee participated in protected activity, the employer knew of that activity and adverse action was taken against the employee. Kahn v. Salerno, 90 Wn. App. 110,131, 951 P. 2d 321 (1998).

Summary judgment is disfavored in cases involving inherently factual questions of intent and motivation. Lowe v. City of Monrovia, 775 F. 2d 998,1009 (9th Cir. 1985), amended, 784 F. 2d 1407 (9th Cir. 1986). This Court should follow the logic of disparate treatment cases,

and hold that the question of the true motivation behind an allegedly discriminatory act is a "pure question of fact." Pullman-Standard v. Swint, 456 U.S. 273,287-88, 72 L. Ed. 2d 66 102 S. Ct. 1781 (1982). More specifically, a plaintiff like Dr. Sambasivan in a retaliation case should be allowed to show pretext by relying on his initial evidence of a prima facie case, any other evidence, as well as effective cross-examination. Miller v. Fairchild Industries, Inc., 885 F. 2d 498,505, n. 8 (9th Cir. 1989), citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248,255, n. 10, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).

Much of the evidence concerning Kadlec's defense of Dr. Sambasivan's retaliation claim depends on the intent and motivation of the members of the Kadlec board who attended the meeting of August 14, 2008, and there took action against Dr. Sambasivan. Knowledge of what occurred at that meeting is particularly within the minds of those witnesses. In this setting, the rule articulated by Judge Sweeney in Estate of Black, 116 Wn. App. 476,487, 66 P. 3d 670 (2003), affirmed on other grounds, 153

Wn. 2d 152 (2004) should apply:

And this was proper in light of the general rule that, where material facts averred in an affidavit are particularly within the knowledge of the moving party, summary judgment should be denied. The matter should proceed to trial so that the opponent may attempt to disprove the alleged facts by cross-examination and by the demeanor of the witnesses while testifying. Mich. Nat'l Bank v. Olson, 22 Wn. App. 898,905 723 P.2d 438 (1986); Balise v. Underwood, 62 Wn. 2d 195, 199-200, 381 P. 2d 966 (1963). This exception to the summary judgment rules is not limited just to the moving party herself, but to her witnesses also.²

²This is the federal practice also. See, e.g., United States v. Logan Co., 147 F. Supp. 330,333 (W.D. Pa. 1957); Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580,581 (3d Cir. 1948).

The manner in which Kadlec has attempted to explain its motives in stripping Dr. Sambasivan of clinical privileges depends on witnesses with particularized knowledge. That knowledge is little other than a state of mind. Knowledge of this sort is inherently not beyond dispute. Cross-examination should be allowed. A properly constituted trier of fact should evaluate the assertions made by these witnesses. Therefore, summary judgment should be denied. The trial court should be reversed.

VIII. DISCOVERY OF MATERIALS ESSENTIAL TO
THE DEVELOPMENT OF DR. SAMBASIVAN'S
DISCRIMINATION CLAIM SHOULD NOT BE
DENIED ON GROUNDS OF A PEER REVIEW
PRIVILEGE.

In an effort to develop the factual elements of his unlawful discrimination claim, Dr. Sambasivan requested production of certain peer review materials. (CP 51-56) Kadlec resisted the request and Dr. Sambasivan's motion to compel discovery was denied by the trial court. (CP 72-73) The trial court grounded its decision on the so-called peer review privilege found in RCW 4.24.250(1) and RCW 70.41.200(3). (CP 73) A proper interpretation of those statutory provisions should allow Dr. Sambasivan the discovery he requested.

Dr. Sambasivan anticipates that Kadlec will argue that he should not have discovery of peer review materials because he no longer has a claim of unlawful discrimination. That argument lacks foundation in fact and in law. As a matter of fact, Dr. Sambasivan never abandoned his claim of unlawful discrimination. The claim as initially pled was never dismissed; it was never the subject of an agreement between the parties. Indeed, specific allegations concerning

a prohibition of unlawful discrimination in the medical staff bylaws, as well as disparate treatment are found in the second amended complaint. (CP 75,78) As a matter of law, retaliation (specifically alleged in the second amended complaint), is a form of unlawful discrimination. Jackson v. Birmingham Board of Education, 544 U.S. 167,173-174, 161 L. Ed. 2d 361, 125 S. Ct. 1497 (2005). That retaliation is a species of unlawful discrimination under Washington law is evident from the site of the specific, statutory prohibition of retaliation. RCW 49.60.210.

Essential to the proper development of Dr. Sambasivan's unlawful discrimination claim is the discovery of how the peer review process was applied to the other three interventional cardiologists holding privileges at Kadlec. In Dr. Sambasivan's view, he has been harmed by a discriminatory application of the peer review process to himself. Much of Dr. Sambasivan's case is grounded on showing that so-called peer review was applied to him more frequently, more critically and less justifiably than it was applied to the other three interventional cardiologists.

By sustaining Kadlec's objection to Dr. Sambasivan's discovery requests based on the privilege found in RCW 4.24.250(1), and RCW 70.41.200(3), the trial court effectively prevented Dr. Sambasivan from pursuing his unlawful discrimination claim.

A careful reading of the statutes in question does not support Kadlec's position. RCW 4.24.250(1) explicitly excepts materials concerning "actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider" RCW 4.24.250(1). Thus, the materials sought by Dr. Sambasivan should be treated as falling under the coverage of this exception.

RCW 70.41.200(3)(c) describes an exception to the peer review privilege with respect to materials "regarding such health care provider." An overly literal reading of that text would limit Dr. Sambasivan's discovery to materials bearing only his name. To appreciate peer review as applied to himself, a comparative analysis is necessary. Thus, peer review materials involving physicians similarly situated to Dr. Sambasivan should also be discoverable.

It is generally accepted as a universal principle of jurisprudence that claims of privilege to avoid testimony or discovery are disfavored. An evidentiary privilege should not be allowed unless it "promotes sufficiently important interests to outweigh the need for probative evidence." Jaffee v. Redmond, 518 U.S. 1,2, 135 L.Ed. 2d 337, 116 S.Ct. 1923 (1996). In a case analogous to medical peer review, the U.S. Supreme Court rejected a claim of academic peer review privilege, and noted that privileges "contravene the fundamental principle that the public has a right to every man's evidence." Univ. of Pa. v. E.E.O.C., 493 U.S. 182,189, 107 L.Ed. 2d 571, 110 S.Ct. 577 (1990). The federal view finds the same voice in this state where, as noted by Justice Andersen: "it is thus clear that testimony is the rule and privilege is the exception." State v. Maxon, 110 Wn.2d 564,570, 756 P.2d 1297 (1988). Specifically, with respect to discovery of medical peer review materials, Judge Green articulated the applicable rule placing the burden of establishing the privilege on the party asserting it. Ragland v. Lawless, 61 Wn. App. 830,837, 812 P.2d 872 (1991). More pointedly, it would seem that a proper application

of Ragland, 61 Wn. App. at 838 would allow discovery to Dr. Sambasivan because his discovery requests have been made in a case "arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider." RCW 4.24.250(1).

The evidentiary privilege asserted by Kadlec here is related to a federal statutory scheme that limits damages available to physicians claiming injury through misguided peer review. The fundamental federal statute is the Health Care Quality Improvement Act, 42 USC 11101 et seq. This state has adopted that statute by reference, RCW 7.71.020. The evidentiary privilege asserted by Kadlec here is a creature of statute, RCW 4.24.250 and RCW 70.41.200. The privilege asserted by Kadlec based on these two statutory provisions should not be allowed because the overall statutory scheme excepts actions for damages "under any law of the United States or any State relating to the civil rights of any person. . . ." 42 USC 11111 (a)(1).

To extend the privilege asserted by Kadlec to materials concerning peer review of other Kadlec cardiologists would lead to an absurd result.

While limiting damages available to physicians harmed by improper peer review, both the federal and state statutes expressly except from any limitation all claims of unlawful discrimination:

If a professional review action . . . meets all the standards specified in section 412 (a) . . . (A) the professional review body, . . . shall not be liable in damages under any law of the United States or of any state (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person 42 USC 11111(a)(1)

The foregoing language is also a component of the law of this state. RCW 7.71.020.

Both federal and state law allow unlawful discrimination claims without the limitations imposed on those seeking damages for improper peer review, generally. Thus, Dr. Sambasivan's unlawful discrimination claim is unfettered by the substantive statutes limiting civil actions challenging peer review. Dr. Sambasivan's express right to pursue his unlawful discrimination claim would be meaningless without discovery. To bar discovery as urged by Kadlec would effectively bar Dr. Sambasivan's unlawful discrimination claim. If a party may not develop his or her

unlawful discrimination claim through discovery, there may be no claim.

Justice Finley concisely articulated the rule of statutory construction that should govern here:

And this court has long held that a thing within the letter of the law, but not within its spirit, may be held inoperative where it would otherwise lead to an absurd conclusion. Murphy v. Campbell Inv. Co., 79 Wn. 2d 417, 421, 486 P.2d 1080 (1971).

Where, as here, the plaintiff is prosecuting an unlawful discrimination claim that is expressly allowed by governing peer review statutes, extending the peer review privilege to bar discovery with respect to that claim leads to an absurd result. Therefore, the trial court's order denying Dr. Sambasivan's motion to compel discovery should be reversed.

IX. AS EACH PARTY HAS PREVAILED ON A MAJOR ISSUE, NEITHER SHOULD HAVE BEEN AWARDED ATTORNEY FEES AND EXPENSES.

Judge Swisher accurately assessed the record in this case with respect to attorney fees and

expenses:

The issue of attorney fees in this case is difficult to deal with because each side has been successful in certain aspects of the case and much of the pre-trial discovery and related legal work would apply to activities supporting both claims. The approximately five inches of briefs and supporting affidavits have not added much clarity to this issue.

It is impossible to know the thought process or intent of the attorney in conducting much of the work before trial. Therefore it is difficult, if not impossible, to accurately segregate out attorney fees related to one issue versus another issue. Any segregation of attorney fees is, of necessity, arbitrary under the circumstances of this case. (CP 2036)

Given the positions of the parties after trial of Dr. Sambasivan's call coverage claim, Judge Swisher should have declined to award attorney fees and expenses. Dr. Sambasivan so moved the trial court. (CP 1373)

Where, as here, each party prevails on a major issue, neither should be awarded attorney fees and expenses. American Nursery v. Indian Wells, 115 Wn. 2d 217, 234-35, 797 P. 2d 477 (1990); Marassi v. Lau, 71 Wn. App. 912, 916, 859 P. 2d 605 (1993).

Assuming that Dr. Sambasivan prevails in this Court on his retaliation claim, he may be entitled to attorney fees. Nonetheless, he is not yet the prevailing party on that claim. Therefore, the attorney fee question should be remanded for determination by the trial court at the conclusion of this case. Frisino v. Seattle School District, 160 Wn. App. 765,785-86, 249 P. 3d 1044 (2011).

Assuming that Dr. Sambasivan prevails on his effort to compel discovery of certain peer review materials, consideration of an award of attorney fees and expenses should also occur on remand. At this stage, Dr. Sambasivan does not seek an award pursuant to CR 37(a)(4). In the event he prevails on his discrimination claim on remand in the trial court, he will then request an award of attorney fees and expenses for work on the discovery matter.

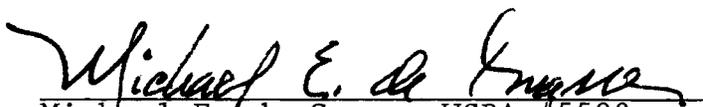
CONCLUSION

Based on the foregoing argument, the trial court should be reversed.

This case should be remanded to the trial court so that the appellant may proceed with his claims of breach of contract, tort and retaliation. The appellant should also be allowed to have discovery of peer review materials previously requested. Finally, the awards of attorney fees and expenses should be vacated.

Dated this 2nd day of September, 2011.

Respectfully submitted,


Michael E. de Grasse WSBA #5593
Counsel for Appellant

Order Denying Plaintiff's Motion to Compel Discovery
(CP 72)

JOSIE DELVIN
BENTON COUNTY CLERK

MAR 18 2009

FILED

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR BENTON COUNTY

VENKATARAMAN SAMBASIVAN, M.D.,

Plaintiff,

v.

KADLEC MEDICAL CENTER, a
corporation,

Defendant.

NO. 08-2-01534-1

CR

~~PROPOSED~~ ORDER DENYING
PLAINTIFF'S MOTION TO COMPEL
DISCOVERY

THIS MATTER came before the Court on Plaintiff's Motion to Compel Discovery. Plaintiff Venkataraman Sambasivan, M.D. seeks to compel the production of documents and other information maintained by coordinated quality improvement programs of Defendant Kadlec Medical Center ("Kadlec") (i.e., "peer review" records) pertaining to physicians other than Plaintiff. Plaintiff has sought to discover from Kadlec certain peer review records pertaining to these other interventional cardiologists. Plaintiff argues that because he has asserted a discrimination claim, he is entitled to obtain these records notwithstanding their privileged status under RCW 4.24.250(1) and RCW 70.41.200(3).

The following documents were called to the Court's attention in connection with this Motion:

1. Plaintiff's Motion to Compel Discovery, and exhibits thereto; and

{PROPOSED} ORDER DENYING PLAINTIFF'S MOTION TO
COMPEL DISCOVERY - 1

ORIGINAL

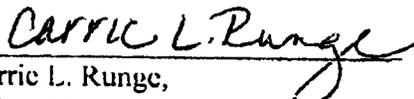
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1 2. Defendant's Opposition to Plaintiff's Motion to Compel Discovery, and exhibits
2 thereto.

3 The Court has considered the documents listed above, heard oral argument, and
4 determined that the documents Plaintiff seeks to discover are privileged peer review records
5 under RCW 4.24.250(1) and RCW 70.41.200(3) and that these statutes contain no exceptions
6 permitting their production here.

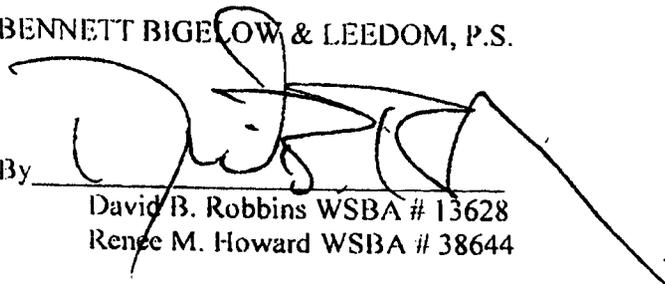
7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to
8 Compel Discovery is DENIED, and that the peer review records of Kadlec physicians other than
9 those of Plaintiff are privileged and are not subject to review, disclosure, subpoena, discovery, or
10 introduction into evidence in this action pursuant to RCW 4.24.250(1) and RCW 70.41.200(3).

DONE this 18 day of March, 2009.

11 
12 Hon. Carrie L. Runge,
13 Judge of the Superior Court

14 PRESENTED BY:

15 BENNETT BIGELOW & LEEDOM, P.S.

16 
17 By _____
18 David B. Robbins WSBA # 13628
19 Renee M. Howard WSBA # 38644

20 APPROVED AS TO FORM AND NOTICE OF ENTRY WAIVED:

21 By: 
22 Michael E. Grasse WSBA #5593
23 Attorney for Plaintiff
24

Findings of Fact and Conclusions of Law re: Call
Coverage Claim (CP 874)

JOSIE DELVIN
BENTON COUNTY CLERK

MAY 26 2011

FILED

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7 SUPERIOR COURT OF WASHINGTON FOR BENTON COUNTY

8 VENKATARAMAN SAMBASIVAN,) No. 08 2 01534 1
9 Plaintiff,)
10 vs.) FINDINGS OF FACT AND CONCLUSIONS
11 KADLEC MEDICAL CENTER, a) OF LAW RE: CALL COVERAGE CLAIM
12 corporation,)
13 Defendant.)

14 THIS MATTER having been tried to the bench on May 10 and
15 11, 2010, and the Court having rendered its Memorandum Decision
16 of June 8, 2010, the Court now makes the following Findings of
17 Fact and Conclusions of Law.

18 FINDINGS OF FACT

19 1. The plaintiff, Venkataraman Sambasivan, is an indi-
20 vidual domiciled in the County of Benton, State of Washington.

21 2. The plaintiff is a board certified interventional
22 cardiologist duly licensed to practice in the State of
23 Washington.

24 3. The plaintiff maintains an office for the practice of
25

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: CALL COVERAGE CLAIM - 1

Michael E. de Grasse
Lawyer
P.O. Box 494

Walk
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1 medicine in Pasco, Washington and provides medical services to
2 patients primarily in the counties of Benton and Franklin, State
3 of Washington, in an area commonly known as the "Tri-Cities."

4 4. The defendant is a not-for-profit corporation operating
5 as Kadlec Hospital, a regional medical center in Richland,
6 Washington.

7 5. Since 2001, the defendant has been authorized by the
8 State of Washington to provide and has provided interventional
9 cardiology facilities to physicians and patients at its hospital
10 in Richland. Many of the interventional cardiology facilities
11 provided by the defendant are not available at other hospitals
12 in the Tri-Cities.

13 6. The defendant advertises itself as a provider of special
14 interventional cardiology facilities.

15 7. A physician cannot practice medicine at the defendant's
16 hospital in Richland without first having been granted
17 privileges by the defendant. The granting of privileges to
18 physicians by the defendant is completely within its discretion.

19 8. The plaintiff was granted privileges to practice
20 interventional cardiology by the defendant at the defendant's
21 hospital in Richland at the beginning of the interventional
22 cardiology program there in 2001.

23 9. In mid-July, 2004, the plaintiff relinquished his
24 practice of certain procedures of interventional cardiology at
25 Kadlec. This action by the plaintiff occurred through a process

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: CALL COVERAGE CLAIM - 2

Michael E. de Grasse
Lawyer
P.O. Box 494

Walk
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1 described by the defendant as "collegial intervention."

2 10. In accordance with an understanding reached by the
3 parties, the plaintiff was removed from Kadlec's on-call coverage
4 list for interventional cardiology (but not for general cardio-
5 logy) and was required to undertake certain training and conduct
6 a certain number of proctored medical procedures after July, 2004.

7 11. By June, 2005, the plaintiff was of the view that he had
8 fulfilled the collegial intervention requirements of the defendant
9 with respect to training and proctored procedures. He asked to
10 be reinstated to the defendant's emergency call coverage list for
11 interventional cardiology from which he had been excluded in
12 mid-July, 2004.

13 12. The plaintiff made his request to be restored to the
14 emergency call coverage list for interventional cardiology to
15 Christopher Ravage, M.D., another interventional cardiologist
16 privileged at Kadlec and the individual responsible for main-
17 taining Kadlec's "on-call" schedule for interventional cardio-
18 logists.

19 13. Christopher Ravage, M.D. restored the plaintiff to the
20 emergency call coverage list after obtaining permission from the
21 defendant's chief of operations, Suzanne Richins. Ms. Richins
22 personally granted the request of the plaintiff to be placed on
23 the emergency call coverage list after this request was conveyed
24 to Ms. Richins by Dr. Ravage.

25 14. From July, 2005, until October 20, 2006, the plaintiff

1 was on the emergency call coverage list. During this time, he
2 was called to provide services in the emergency department of
3 the defendant's hospital in Richland as an interventional cardio-
4 logist. During that time period, Dr. Sambasivan billed and
5 collected payment from the patients and their insurers for his
6 professional services.

7 15. From the inception of the interventional cardiology
8 program at the defendant's hospital in Richland, the plaintiff,
9 as well as other interventional cardiologists, provided call
10 coverage to the defendant as interventional cardiologists without
11 pay for providing that coverage other than by payment for their
12 professional services by the patients they treated and their
13 insurers.

14 16. In 2004, the defendant received pressure from certain
15 physicians to pay them for providing call coverage. On January
16 25, 2005, the defendant, through its Board of Directors, adopted
17 a program to pay certain physicians for providing call coverage.
18 Interventional cardiologists were among the physicians with
19 respect to whom payment for providing call coverage was to be
20 made.

21 17. Interventional cardiologists providing call coverage
22 beginning in February, 2005, were to be paid \$1,000 per day for
23 each day they were on call in a month after providing two days
24 without compensation.

25 18. When the defendant began its payment for call coverage

1 in February, 2005, neither the plaintiff nor Christopher Ravage,
2 M.D. was exercising privileges for the practice of certain proce-
3 dures of interventional cardiology at the defendant's hospital
4 in Richland, and, therefore, neither was placed on the call
5 coverage list for interventional cardiology.

6 19. When Christopher Ravage, M.D. resumed exercising his
7 privileges for the practice of interventional cardiology in
8 April, 2005, he was immediately placed on the call coverage list,
9 given a written contract which he executed, and paid \$1,000 per
10 day for providing call coverage pursuant to that contract.

11 20. After the defendant adopted the policy to compensate
12 interventional cardiologists for providing call coverage, two
13 physicians were offered and made written contracts for payment
14 for providing call coverage services retroactive to a date
15 before the written contracts were made and signed. Of these two
16 contracts, one was retroactive for a period of two weeks by its
17 own terms, and the other was effective the date signed, but the
18 contracting physician was paid for services performed two weeks
19 before that contract was made and executed.

20 21. In June, 2005, the defendant adopted a formal policy
21 allowing certain doctors who had not signed call coverage con-
22 tracts until after a May 16, 2005, deadline to have their call
23 coverage contracts retroactively effective to January 1, 2005.

24 22. The plaintiff was granted retroactive call coverage pay
25 for a period of approximately four months in 2008 when his call

1 coverage contract was not renewed in April, 2008, owing to an
2 oversight on the part of the defendant.

3 23. During the period July 1, 2005, to October 21, 2006,
4 four interventional cardiologists were on the defendant's call
5 coverage list for interventional cardiology at the defendant's
6 hospital in Richland. Three of these physicians had written
7 contracts with the defendant that provided compensation for them
8 for call coverage. The terms of each of these three contracts
9 included a provision that made them twelve months in length, but
10 could be terminated at any time without cause on notice of thirty
11 days. Each contract also provided that it could be immediately
12 terminated in the event the physician lost his privileges. The
13 plaintiff had no written contract.

14 24. The plaintiff was one of the four interventional cardio-
15 logists on the defendant's call coverage list from July 1, 2005,
16 to October 21, 2006. The plaintiff was not paid for providing
17 call coverage during this period, but the other three physicians
18 were paid.

19 25. Suzanne Richins, chief of operations for the defendant,
20 knew that the plaintiff was on the defendant's call coverage list
21 and was providing call coverage during the period of June, 2005,
22 to October 21, 2006.

23 26. By providing call coverage on the defendant's emergency
24 call coverage list, the plaintiff provided an economic benefit
25 to the defendant. The plaintiff's provision of call coverage

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: CALL COVERAGE CLAIM - 6

Michael E. de Grasse
Lawyer
P.O. Box 494

Walls
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1 services lightened the load of the other interventional cardio-
2 logists, by providing them a better opportunity to rest. As a
3 result of the plaintiff's provision of call coverage, the
4 defendant was aided in presenting itself as a high-quality
5 regional hospital and chest-pain center with specialized cardio-
6 logy services readily available. Without sufficient physicians
7 to provide these services, the defendant must hire from outside
8 the area to provide those services. Obtaining services from
9 physicians outside the Tri-Cities area to provide interventional
10 cardiology coverage is more expensive for the defendant than
11 compensating the plaintiff and other three local interventional
12 cardiologists. If the plaintiff were not on the defendant's call
13 coverage list, it would have had to pay other physicians for
14 providing services that were provided by the plaintiff.

15 27. The defendant was aware that the plaintiff was providing
16 call coverage as its chief of operations, Suzanne Richins,
17 authorized placement of the plaintiff on the call coverage list
18 beginning July, 2005, and knew that the plaintiff was, in fact,
19 on that list and providing services.

20 28. On several occasions, the plaintiff spoke to an officer
21 of the defendant, William Wingo, requesting that he be paid like
22 the other interventional cardiologists for providing call
23 coverage.

24 29. The defendant was aware that it received considerable
25 value by reason of interventional cardiologists' provision of

1 call coverage services.

2 30. The defendant chose to ignore the plaintiff's requests
3 for compensation while accepting his services that had value and
4 that benefitted the defendant.

5 31. When Christopher Ravage, M.D. resumed his practice of
6 certain procedures of interventional cardiology on the defen-
7 dant's staff in April, 2005, the defendant immediately offered
8 him a written contract which he accepted following which the
9 defendant began paying Dr. Ravage for providing call service.

10 32. When the plaintiff was placed on the on call list and
11 began providing certain cardiological services in July, 2005,
12 he was not offered a contract by the defendant. The plaintiff
13 was not paid for providing his services. The plaintiff was
14 treated unfairly.

15 33. In several instances, the defendant paid physicians
16 retroactively for providing call coverage, but, in this instance,
17 the defendant has refused to pay the plaintiff retroactively for
18 providing call coverage for the period July 1, 2005, until
19 October 21, 2006. The defendant has treated the plaintiff
20 unfairly.

21 34. The facts show that by providing certain professional
22 services to the defendant, the plaintiff conferred a benefit
23 upon the defendant.

24 35. The above-described benefit conferred by the plaintiff
25 on the defendant was known and appreciated by the defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: CALL COVERAGE CLAIM - 8

Michael E. de Grasse
Lawyer
P.O. Box 494

Walla
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1 36. The acceptance and retention of the benefit of the
2 plaintiff's professional services provided to the defendant is
3 inequitable.

4 37. During the period July 1, 2005, through October 20,
5 2006, the plaintiff provided call coverage services to the
6 defendant for seventy-four days for which he should have re-
7 ceived compensation under the call coverage program then in
8 place at the rate of \$1,000 per day.

9 38. The plaintiff should be made whole for the defendant's
10 failure to compensate him for his professional services during
11 the period July 1, 2005, through October 20, 2006, by an award
12 of \$74,000.00.

13 39. The damages that the plaintiff should be awarded are
14 liquidated and are determined by reference to a fixed standard
15 and without reference to opinion or discretion. Therefore, the
16 plaintiff is entitled to prejudgment interest on the damages
17 that should be awarded him.

18 40. The plaintiff properly supported his claim for pre-
19 judgment interest by computation the results of which are set
20 forth in Plaintiff's Exhibit 7, received in evidence at trial.
21 Therefore, the plaintiff should be awarded prejudgment interest
22 to the date the judgment is entered. A copy of Plaintiff's
23 Exhibit 7 is attached hereto and fully incorporated in these
24 findings of fact by this reference.

25 41. The plaintiff has proven his claim for damages for

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: CALL COVERAGE CLAIM - 9

Michael E. de Grasse
Lawyer
P.O. Box 494

Walla
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1 unpaid compensation in the amount of \$74,000.00, together with
2 prejudgment interest in the amount of \$38,650.00 through May,
3 2010, which amount should be increased by additional interest on
4 the sum of \$74,000 at the statutory rate of 12% until judgment
5 herein is finally entered.

6 42. As the plaintiff has been successful in recovering
7 compensation owed him by the defendant, he should be awarded his
8 attorney fees and costs pursuant to RCW 49.48.030, as well as
9 on equitable grounds.

10 43. No evidence was presented as to how much plaintiff was
11 paid by his patients or their insurers for professional services
12 from on-call referrals, nor was evidence presented as to how
13 much any other interventional cardiologist made from the profes-
14 sional services they rendered while on-call.

15
16 CONCLUSIONS OF LAW

17 On the basis of the foregoing findings of fact, the Court
18 now makes the following conclusions of law.

19 1. The Court has jurisdiction of the parties and subject
20 matter of this case.

21 2. By reason of the provision of uncompensated professional
22 services by the plaintiff to the defendant, the defendant has
23 been unjustly enriched.

24 3. The unjust enrichment of the defendant resulting from
25 the plaintiff's provision of uncompensated call services should
be rectified by a contract implied in law.

1 4. The plaintiff should be awarded judgment against the
2 defendant for his uncompensated professional services in the
3 amount of \$74,000.00.

4 5. The plaintiff should be awarded judgment against the
5 defendant for prejudgment interest in the amount of \$38,650
6 for the period through May, 2010, together with interest at the
7 statutory rate of 12% on the sum of \$74,000.00 from June, 2010,
8 until the judgment herein is finally entered. Prejudgment
9 interest for the period June, 2010, through April, 2011 totals
10 \$8,140.00.

11 6. The plaintiff should be awarded judgment against the
12 defendant for his attorney fees, costs and expenses incurred in
13 prosecuting this call coverage claim. The determination of these
14 costs, expenses and attorney fees will be set forth in findings
15 of fact and conclusions of law separate from these.

16 LET JUDGMENT BE ENTERED ACCORDINGLY.

17 Done by the Court this 26 day of MAY, 2011.

18
19 
20 Robert G. Swisher
21 Judge

22 PRESENTED BY:

23 
24 Michael E. de Grasse WSBA #5593
25 Counsel for Plaintiff

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: CALL COVERAGE CLAIM - 11

Michael E. de Grasse
Lawyer
P.O. Box 494

Walla
(0-000000884