

No. 86177-3

SUPREME COURT OF THE STATE OF WASHINGTON

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VENKATARAMAN SAMBASIVAN,
an individual,

Appellant/Cross
Respondent,

vs.

KADLEC MEDICAL CENTER, a
corporation,

Respondent/Cross
Appellant.

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

Michael E. de Grasse
Counsel for Appellant/Cross
Respondent
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INTRODUCTION

Contrary to Kadlec's contention, neither Dr. Sambasivan's position nor its doctrinal foundation is dangerous (Brief of Respondent/Cross Appellant at 19, 27, 56), disruptive (Ibid. 37, 46, 56-57) or esoteric (Ibid. at 32). Dr. Sambasivan, an accomplished medical practitioner with an unblemished record of safe practice, seeks nothing more than the legal warrant to correct unfair and injurious treatment of him by Kadlec.

By recognizing and applying ordinary legal principles to the decision under appeal, the trial court's analytical errors are exposed. Cases concerned with a hospital board's general power to decide whether privileges should be granted to applicant physicians do not serve as a basis for denying Dr. Sambasivan's contractual rights, as an established medical staff member, under corporate and medical staff bylaws. The purpose of the peer review privilege is not served by denying Dr. Sambasivan routine discovery of peer review materials in the course of prosecuting his unlawful discrimination claim.

The record amply shows that Kadlec's board had no basis in medical practice or hospital governance to act contrary to its own Medical Executive Committee's recommendations concerning Dr. Sambasivan and volume requirements with respect to certain procedures. Where, as here, Dr. Sambasivan has shown that there

is no reasonable medical ground for adopting a volume requirement, making the new volume requirement effective retroactively and stripping him of certain privileges, his claim of retaliation should not be dismissed based on conclusory submissions by Kadlec board members:

Retaliating against Dr. Sambasivan for filing a lawsuit was the farthest thing from my mind, and, to my knowledge, the mind of the other Board members. (CP 186:4-8;188:4-8;190:4-8; 192:4-10;194:12-13;197:4-8)

Conclusory opinions concerning the content of the minds of board members should not be allowed to defeat summarily Dr. Sambasivan's claims.

The trial court's errors are sharpened in clarity when seen in the light cast by the judgment against Kadlec on Dr. Sambasivan's call coverage claim. Findings and conclusions with respect to that claim show Kadlec's history of unfair treatment of Dr. Sambasivan. Further discovery should be allowed Dr. Sambasivan notwithstanding the peer review privilege. In summary, the trial court judgment dismissing Dr. Sambasivan's claims of contract breach, tort and retaliation, together with the order denying him discovery should be reversed. The trial court judgment favoring Dr. Sambasivan on his call coverage claim should be affirmed. Neither party, at this stage, should be awarded attorney fees and expenses.

OBJECTION AND MOTION TO STRIKE
APPENDIX AND CITATION OF UNPUBLISHED OPINIONS

On page 32, n. 25, of its brief, the respondent/cross appellant cites and discusses Clawson v. Corman, 154 Wn. App. 1018 (2010) in support of its position, and in an effort to overcome the authoritative force of In re Estate of Black, 116 Wn. App. 476, 66 P. 3d 670 (2003), affirmed on other grounds, 153 Wn. 2d 152, 102 P. 3d 796 (2004). Clawson v. Corman, supra, is an unpublished opinion of the Court of Appeals. See: RCW 2.06.040.

On page 61, of its brief, the respondent/cross appellant cites and discusses Leslie v. Cap Gemini AM, Inc., 319 Fed. Appx. 689 (9th Cir. 2009) in support of its position and contrary to the authority Wise v. City of Chelan, 133 Wn. App. 167, 135 P. 3d 951 (2006). Leslie, supra, is an unpublished disposition and is expressly described as "not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3." Leslie, 319 Fed. Appx. at 690.

The citation of Clawson, supra, violates

GR 14.1(a). The citation of Leslie, supra, violates GR 14.1(b) in that the citation here is not permitted by Ninth Circuit Rule 36-3 because this Court is not a court of the Ninth Circuit.

It has long been recognized that citing unpublished opinions as done by the respondent/cross appellant here, is prohibited and may be sanctionable. Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 519, 108 P. 3d 1273 (2005).

The appellant/cross respondent objects to the citation of the unpublished opinions listed above and moves this Court to strike them from the respondent/cross appellant's brief.

On page 47, of its brief, the respondent/cross appellant refers to a newspaper article the contents of which purportedly support the position of the respondent/cross appellant. Apparently, the newspaper article is included in an appendix of the respondent/cross appellant's brief as an "Addendum." Clearly, this newspaper article is not an opinion of a court of record. Clearly, this newspaper article is not part of the record on review.

Therefore, its inclusion as an appendix to the respondent/cross appellant's brief is in violation of RAP 10.3(a)(8). The appellant/cross respondent objects to the improper appendix and moves this Court to strike it.

ARGUMENT IN REPLY

- I. NOTWITHSTANDING KADLEC'S ASSERTED INTEREST IN PATIENT SAFETY, IT UNLAWFULLY RETALIATED AGAINST DR. SAMBASIVAN WHEN IT ACTED CONTRARY TO ITS OWN MEDICAL EXECUTIVE COMMITTEE RECOMMENDATION AND ITS OWN BYLAWS BY STRIPPING DR. SAMBASIVAN OF PRIVILEGES TO PRACTICE INTERVENTIONAL CARDIOLOGY.

The following propositions are established by record evidence, or, at least, they are supported by record evidence sufficiently to raise issues of material fact.

1. Dr. Sambasivan is and was an excellent medical practitioner and no threat to patient safety. (CP 541,542,543,596)
2. As stated by well-qualified interventional cardiologist Angelo S. Ferraro, M.D., Kadlec's change in volume requirements for certain procedures to maintain privileges was "not medically reasonable." (CP 617:7)
3. Both the Kadlec corporate bylaws and the medical staff bylaws provide hearing rights to physicians who are subject to a recommendation that the physician's clinical privileges be reduced or restricted. (CP 383,434)
4. Had Dr. Sambasivan been allowed a hearing

as required by the bylaws, he would have prevailed by exposing the deficiencies in the Duerr report. (CP 581-586;577-579)

5. At worst, acceptance of the Medical Executive Committee's recommendation following a hearing would have caused Dr. Sambasivan to lose only some, not all, of his privileges to practice interventional cardiology. The Medical Executive Committee recommended that Dr. Sambasivan's privileges be reduced so that he would only perform interventional procedures in elective cases. The Board's action actually stripped Dr. Sambasivan of all privileges to practice interventional cardiology.
6. Kadlec's board adopted certain volume requirements and give them retroactive effect, contrary to its own Medical Executive Committee's recommendation. (CP 550)
7. As stated by Thomas Cowan of the Kadlec board, the volume requirement was implemented with retroactive effect with the specific goal of reducing Dr. Sambasivan's privileges. (CP 551)
8. As shown by the outcome and factual findings following the trial of Dr. Sambasivan's call coverage claim, Kadlec had a history of treating Dr. Sambasivan unfairly. (CP 881)
9. At the time Dr. Sambasivan filed his initial complaint against Kadlec in June, 2008, he had concluded that he had been the victim of discrimination on the basis of race, ethnicity or national origin. (CP 553,554)
10. The only new information that was made known to the Kadlec board in August, 2008, at the time it rejected the recommendation of its own Medical Executive Committee and stripped Dr. Sambasivan of all privileges to practice interventional cardiology, was

the initiation of Dr. Sambasivan's discrimination claim against Kadlec. The declarations of Kadlec board members reiterating in the same words that none had retaliation in his or her mind at the time of the board vote on August 14, 2008 and the content of the minds of other board members was the same, is conclusory, at best. (CP 186:4-8;188:4-8; 190:4-8;192:4-10;194:12-13;197:4-8)

The foregoing propositions show that summary judgment dismissing Dr. Sambasivan's claims of contract breach, tortious interference and retaliation should have been denied. The trial court should be reversed.

Precedential authority concerning hospital governance and the availability of summary judgment, militate in favor of Dr. Sambasivan's position. With respect to hospital governance, neither Group Health Cooperative of Puget Sound v. King County Medical Society, 39 Wn. 2d 586, 237 P. 2d 737 (1951) nor Rao v. Board of County Commissioners, 80 Wn. 2d 695, 497 P. 2d 591 (1972) supports Kadlec's contention that its board has absolute power. This case involves rights provided by hospital bylaws not the abstract question of a hospital board's power to determine privileges to new applicants. Neither Group Health, supra, nor Rao, supra, permit hospital boards to disregard their rules. This Court should follow Bass v. Ambrosius, 185 Wisc. 2d 879, 520 N.W. 2d 625 (Wisc. App. 1994) and recognize that medical staff

bylaws are contractual and enforceable with respect to hearing rights they provide physicians.

Where, as here, the Kadlec board members submit declarations denying unlawful retaliation as the cause of its action stripping Dr. Sambasivan of privileges, each is purporting to set forth material facts that "are particularly within the knowledge of the moving party." Estate of Black, 116 Wn. App. 476, 487, 66 P. 3d 670 (2003), affirmed on other grounds, 153 Wn. 2d 152, 102 P. 3d 796 (2004).

Contrary to contentions by Kadlec, Estate of Black, does not express an "esoteric doctrine." (Brief of Respondent/Cross Appellant at 32) As noted by Judge Sweeney, Estate of Black (a will contest) merely applies a general principle concerning summary judgment that should be recognized in any civil action. See: Mich. Nat'l Bank v. Olson, 44 Wn. App. 898,905, 723 P. 2d 438 (1986); Balise v. Underwood, 62 Wn. 2d 195, 199-200, 381 P. 2d 966 (1963). Where, as here, Dr. Sambasivan has adduced factual grounds for his claim of retaliation, it should not be summarily dismissed on the grounds of conclusory declarations concerning the contents of the minds of the members of the Kadlec board.

II. THE PURPOSE OF THE STATUTORY PEER REVIEW
PRIVILEGE SHOWS THAT DR. SAMBASIVAN'S
DISCOVERY REQUESTS SHOULD BE ALLOWED.

Axiomatically, evidentiary privileges are disfavored. State v. Maxon, 110 Wn. 2d 564,570, 756 P. 2d 1297 (1988). Not only does the law disfavor evidentiary privileges, but the law recognizes a broad policy favoring discovery in civil litigation. This policy applies to questions of peer review. Coburn v. Seda, 101 Wn. 2d 270,276, 677 P. 2d 173 (1984); Ragland v. Lawless, 61 Wn. App. 830,837, 812 P. 2d 872 (1991).

Kadlec's view is not to the purpose of the peer review statutes in question. The purpose is to shield the peer review process. The purpose is not to deny discovery to a victim of unlawful discrimination. The Health Care Quality Improvement Act, 42 USC 11101 et seq. is part of the law of this state, RCW 7.71.020. The peer review privilege asserted by Kadlec is a creature of statute, RCW 4.24.250 and RCW 70.41.200. This evidentiary privilege is conceptually related to the Health Care Quality Improvement Act, which expressly excepts actions for damages for violations of civil rights. 42 USC 11111(a)(1). As recognized

by Justice Finley:

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, Dr. Sambasivan is prosecuting an unlawful discrimination claim expressly allowed by governing peer review statutes, barring discovery with respect to that claim is absurd. Therefore, the trial court's order denying Dr. Sambasivan's motion to compel discovery should be reversed.

III. WHERE, AS HERE, EACH PARTY HAS PREVAILED
ON A MAJOR ISSUE, NO ATTORNEY FEES AND
EXPENSES SHOULD BE AWARDED, NOTWITHSTANDING
THE ABSENCE OF A CONTRACT THAT IS COMMON TO
ALL CLAIMS.

Contrary to the contentions of Kadlec, controlling authority does not limit the rule concerning denial of claims for attorney fees and expenses where both parties prevail on a major issue to matters of contract. Well established authority shows that attorney fees should be denied in cases where both parties prevail on major issues and the basis for an attorney fee award is statutory. Tallman v. Durussel, 44 Wn. App. 181,189, 721 P. 2d 985 (1986); Oneal v. Colton School Dist., 16 Wn. App. 488,493, 557 P. 2d 11 (1976); Sardam v. Morford, 51 Wn. App. 908, 910-911, 756 P. 2d 174 (1988). The trial court's award of attorney fees and expenses to both parties should be reversed.

ARGUMENT IN RESPONSE

I. WHERE, AS HERE, THE CROSS APPELLANT HAS SHOWN NO LEGAL OR FACTUAL ERROR AFFECTING THE TRIAL COURT JUDGMENT FOR DR. SAMBASIVAN ON HIS CALL COVERAGE CLAIM, THAT JUDGMENT SHOULD BE AFFIRMED.

A. The Purpose of the Federal Stark Law and its State Counterpart Shows that Neither Applies Here.

In considering whether a rule should be applied to certain facts, failing to consider the rule's purpose "may generate a misfit between purpose and application." Posner, How Judges Think, at 178 (2008).

The clear purpose of the Stark Law, 42 USC 1395nn, and its state counterpart, RCW 74.09.240(3), is to prevent improper referral relationships among health care providers. Nothing of that kind is found in this case. Therefore, Kadlec's legal defense to Dr. Sambasivan's unjust enrichment claim is without merit.

B. The Cross Appellant's Challenge to the Factual Grounds of the Trial Court Judgment Should Not be Considered Where, as Here, the Cross Appellant has Failed to Follow RAP 10.3(g).

In support of the trial court's judgment in favor

of Dr. Sambasivan on his call coverage claim, Judge Swisher made forty-three findings of fact. (CP 874-883) Kadlec assigns no error to any specifically identified finding of fact, by number or otherwise. RAP 10.3(g) provides, inter alia:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

A reading of the Kadlec's brief shows a total failure to follow the requirements of this rule. Therefore, Kadlec's challenges to the factual grounds of the trial court judgment should be disregarded.

Not only does Kadlec's failure to comply with RAP 10.3(g) result in a proper disregard of its attack on the trial court's findings of fact, but those findings of fact become verities, and review is "limited to determining whether the findings of fact support the trial court's conclusions of law and judgment." In re Santore, 28 Wn. App. 319,323, 623 P. 2d 702 (1981). Where, as here, no argument is made that the findings of fact do not support the conclusions of law, the trial court judgment in favor of Dr. Sambasivan on his call coverage claim should be affirmed without further review.

C. Notwithstanding the Cross Appellant's Failure to Follow RAP 10.3(g), the Trial Court Judgment is Supported by Substantial Evidence.

All doctrinal elements of unjust enrichment were proved at trial. Thus, testimony showed that Dr. Sambasivan provided call coverage, asked for payment for that coverage and was refused. (TR 53:10-15) Testimony showed that Kadlec benefited as a result of call coverage provided without compensation by Dr. Sambasivan. (TR 30:10-12;37:11;63:12-14;64:14-25; 70:10-25--71:7) Testimony showed that Kadlec knew that Dr. Sambasivan was providing call coverage during the period in question. (TR 32:3-11) Testimony showed that other physicians provided call coverage without signed contracts or were given contracts with retro-active effect. (TR 216:14-22;221:17-20) A reading of the trial testimony shown here together with the trial exhibits shows that more than substantial evidence supports the trial court's findings of fact.

II. ASSUMING THAT ATTORNEY FEES ARE NOT TO BE DENIED, THE TRIAL COURT'S AWARD TO DR. SAMBASIVAN WAS LEGALLY AND FACTUALLY SOUND.

As stated in a foregoing section of this brief, Dr. Sambasivan urges that attorney fees and expenses be denied to both parties. Assuming that this Court does not accept Dr. Sambasivan's view on this question, the trial court's award of attorney fees and expenses to Dr. Sambasivan pursuant to RCW 49.48.030 should be affirmed. That statute provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.
RCW 49.48.030

This statute is remedial and should be liberally construed. Fire Fighters v. City of Everett, 146 Wn. 2d 29,34, 42 P. 3d 1265 (2002).

The reach of RCW 49.48.030's mandate is demonstrated in Fire Fighters, 146 Wn. 2d at 45-46, where a labor union was awarded attorney fees for work before an arbitrator who had awarded back pay to certain members of the collective bargaining unit.

The arbitrator had not addressed the attorney fee question. Indeed, no person had recovered judgment for wages or salary, and no employee (only the union) had retained an attorney or incurred attorney fees. Nevertheless, attorney fees were awarded to the union to further the remedial purpose of the statute. Fire Fighters, 146 Wn. 2d at 45.

The self-employed lawyer and independent contractor in Wise v. City of Chelan, 133 Wn. App. 167, 135 P. 3d 951 (2006) recovered her attorney fees when she prevailed in her action for compensation for legal services she had contracted to provide as a parttime municipal court judge. The plaintiff Wise was not a statutory employee, à la the Internal Revenue Code, of the defendant City of Chelan. Ms. Wise was an independent contractor whom the employer, the defendant City of Chelan, had employed to provide professional services. The plaintiff had a contract in which the City of Chelan agreed to compensate her \$2,750 per month for 15 to 29 hours of service per week. The parties did not treat this compensation as wages or salary. Although the plaintiff did not provide services after the defendant terminated her contract half way through its four-year term, she was awarded "unpaid compensation due her on the contract." Wise, 133 Wn. App. at 169.

Writing for Division III, Judge Sweeney reversed the trial court and awarded Ms. Wise attorney fees pursuant to RCW 49.48.030. Wise, 133 Wn. App. at 175. Noting that the statute covers "any person," the defendant's contention that it should escape liability because Ms. Wise was not an employee was rejected. The Wise court also rejected the defendant's contention that Ms. Wise's attorney fee claim should be denied because she had recovered neither wages nor salary. Judge Sweeney followed Bates v. City of Richland, 112 Wn. App. 919,940, 51 P. 3d 199 (2002) which read "wages or salary" in RCW 49.48.030 to include "any type of compensation due by reason of employment."

Just as Ms. Wise was employed by the City of Chelan to provide professional services as an independent contractor, Dr. Sambasivan provided professional services to Kadlec Medical Center. That Dr. Sambasivan was not a statutory employee does not relieve the defendant of liability as his employer under the statute.

The tendentious reading of RCW 49.48.030 by Kadlec violates well-established principles of statutory interpretation. Three principles should be heeded to avoid the unfair result for which Kadlec argues.

First, when a statutory term is not technical or explicitly defined in the statute, it should be given

its ordinary meaning; a dictionary may be employed. Vance v. Dept. of Retirement Systems, 114 Wn. App. 572,577, 59 P. 3d 130 (Div. III, 2002). Here, "employer" is not defined in the statute. Its ordinary meaning is not confined to one who is the statutory employer of a statutory employee. According to The American Heritage Dictionary of the English Language, (4th ed. 2000) at 586, "employ" means "to engage the services of; put to work." Thus, an "employer" is one who employs, one who engages the services of another. The definition is not limited to employers who engage only statutory employees and not independent contractors. One may "employ" an independent contractor.

Second, statutes should be read to give effect to all their words. King County v. Growth Management Hearings Board, 142 Wn. 2d 543,560, 14 P. 3d 133 (2000). Kadlec's crabbed reading of "employer" in RCW 49.48.030, cannot be harmonized with the statutory grant of attorney fees to "any person" who recovers compensation. Kadlec would redefine "any person" to mean only "any statutory employee." Moreover, that statutory employee would have to be employed by his or her statutory employer. The teaching of Fire Fighters, supra, is to the contrary. Kadlec's argument concerning the meaning of "employer" in RCW 49.48.030, conflicts with more than two

principles of statutory interpretation.

Third, statutes should be interpreted to "give effect to the purpose of the Legislature." State v. Gordon, 91 Wn. App. 415, 419, 957 P. 2d 809 (1998). The purpose of RCW 49.48.030, a remedial statute, is to encourage claims for unpaid compensation. Fire Fighters, 146 Wn. 2d at 35. Accepting Kadlec's argument here would make attorney fees available to only a portion of those who have claims for uncompensated services.

Kadlec's reliance on Warren v. Glascam Building, Inc., 40 Wn. App. 229, 698 P. 2d 565 (1985) is wholly inapposite. The notice requirement imposed in Warren was necessary to allow the jury to make factual findings in order to determine the nature of the employment relationship. Here, the trier of fact was apprised before trial began of Dr. Sambasivan's request under RCW 49.48.030. Moreover, in accordance with Wise, supra, it matters not that Dr. Sambasivan is an independent contractor. Finally, to impose an independent requirement of pleading, as urged by Kadlec, would conflict with the statutory language making attorney fees recoverable "[i]n any action", and impair the statute's remedial reach.

Trial of Dr. Sambasivan's call coverage claim resulted in a judgment against the defendant because

it had been unjustly enriched. (CP 883:21-22) The trial court concluded:

The unjust enrichment of the defendant resulting from the plaintiff's provision of uncompensated call services should be rectified by a contract implied in law. (CP 883:23-25)

Suits seeking recovery grounded in a contract implied in law sound in equity. Family Medical v. Social & Health Servs., 104 Wn. 2d 105,112, 702 P. 2d 459 (1985). Where, as here, the claim is equitable, the award of costs, including attorney fees, should be treated as a matter of discretion of the trial court. Weiffenbach v. Puget Sound Bridge & Dredging Co., 108 Wash. 455,459-460, 184 Pac. 321 (1919); State v. Northwest Magnesite Co., 28 Wn. 2d 1,39, 182 P. 2d 643 (1947). Therefore, in the alternative to RCW 49.48.030, the trial court's award of attorney fees and expenses may be affirmed because no abuse of discretion has been shown.

Just as Kadlec failed to follow RAP 10.3(g) in its challenge to the judgment for Dr. Sambasivan on his call coverage claim, it has failed to follow that rule in its factual challenges to the amount of attorney fees awarded to Dr. Sambasivan. (No challenge was made to the award of expenses.)

In support of the trial court's award of attorney fees and expenses to Dr. Sambasivan, Judge Swisher made nine findings of fact. Kadlec assigns no error to any

specifically identified finding of fact, by number or otherwise. Therefore, Kadlec's challenges to the factual grounds of the trial court's award of attorney fees should be disregarded. Moreover, no argument is made that the findings of fact do not support the conclusions of law with respect to the attorney fee award. Therefore, should this Court not deny an award of attorney fees entirely, the trial court judgment for Dr. Sambasivan should be affirmed without further review. Finally, it should be noted that the amount of the award was supported by substantial evidence (CP 2044-2050), and cannot be shown to be an abuse of the trial court's discretion.

CONCLUSION

Based on the foregoing argument, the trial court's dismissal of Dr. Sambasivan's claims against Kadlec should be reversed. The trial court's judgment in favor of Dr. Sambasivan on his call coverage claim should be affirmed.

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

Dated this 20th day of December, 2011.

Respectfully submitted,



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