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No. 86177-3

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Appeal from Benton County Cause No. 08-2-01534-1

SUPREME COURT OF THE STATE OF WASHINGTON

FILED
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STATE OF WASHINGTON
[Signature]

VENKATARAMAN SAMBASIVAN, an individual,

Appellant/Cross-Respondent,

v.

KADLEC MEDICAL CENTER, a corporation,

Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
KADLEC MEDICAL CENTER TO
APPELLANT/CROSS-RESPONDENT
VENKATARAMAN SAMBASIVAN

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I. INTRODUCTION

This Reply addresses the brief of cross-respondent, Venkatamaran Sambasivan, M.D. (“Sambasivan”), in the appeal of cross-appellant, Kadlec Regional Medical Center (“Kadlec”), concerning whether Sambasivan is entitled to equitable relief based upon an implied contract for providing emergency room coverage in interventional cardiology at Kadlec over a fifteen-month period. That period was bracketed by long periods of time during which Sambasivan lacked interventional cardiology privileges (and thus was unable to take interventional cardiology call) because he voluntarily relinquished his privileges order to address concerns about his patient care.¹ (CP 1312, 1743)

The record below demonstrates that (1) Kadlec did not and could not contract with Sambasivan to pay him a stipend to take interventional cardiology call at the time it entered into written contracts with other interventional cardiologists, because Samsaivan lacked privileges at that

¹ Ironically, Sambasivan’s reply brief starts with the assertion that he comes to this court with “an unblemished record of safe practice.” Cross-Respondent Brief at 1. Like many of his assertions, this statement has no basis in fact (unless “safe practice” is defined solely as having no medical malpractice judgments entered against you). Indeed, many of the claims in Sambasivan’s lawsuit stemmed from his complaints about actions Kadlec took to address concerns about the quality of his care noted by third-party physician reviewers.

time; and (2) Kadlec did not later offer him a written contract to pay him a stipend for interventional cardiology call, given the uncertainty about the status of his interventional cardiology privileges, and the resulting fact that Kadlec could not reasonably anticipate that the contract would be at least a year in length, a legal requirement under the federal Stark law. In addition, the record also established that (1) Sambaivan was in fact paid for taking interventional cardiology call by patients and insurers (but refused to disclose how much he earned); and (2) both parties were aware of statutory prohibitions against a hospital paying compensation to a referring physician in the absence of a signed, written contract. The trial court's conclusory findings fail altogether to address these essential facts in analyzing an equitable claim for unjust enrichment.

In addition, Dr. Sambaivan offers no persuasive rejoinder to Kadlec's arguments that no basis in law or equity exists to award him attorney fees for prevailing on his unjust enrichment claim. Nor does he substantively challenge Kadlec's argument that the amount of fees and costs awarded was unreasonable.

Therefore, the trial court's ruling relative to Sambaivan's unjust enrichment claim should be reversed, as well as its award of attorney fees and costs, whether or not he ultimately prevails on that claim in this appeal.

II. ARGUMENT

A. **To Permit Recovery on the Unjust Enrichment Claim, the Court Must Convert a Legal Arrangement for Hospital Emergency Department Call Coverage Into One that Plainly Violates Federal and State Law.**

The financial relationship between hospitals and physicians is highly regulated. A prominent aspect of that regulation is the federal physician anti-self-referral law known as the Stark law, 42 U.S.C. § 1395nn, and its state law analog, RCW 74.09.240(3). These are strict liability statutes enacted by Congress and the Washington legislature to prevent hospitals and physicians, among others, from billing of Medicare and Medicaid where certain financial arrangements between them exist, unless an exception applies.²

Sambasivan provided interventional cardiology call coverage for Kadlec's emergency department from July 2005 until October 2006, without compensation from the hospital, as required by the Kadlec Medical Staff bylaws as a condition having staff privileges to see patients at Kadlec. Cross-Appellant's Brief at 13-15. These services were not uncompensated, however, because Sambasivan was paid for the professional services he

² See *U.S. v. Rogan*, 459 F. Supp. 2d 692, 712 (N.D. Ill. 2006) ("The Stark Statute . . . broadly defines prohibited financial relationships to include any 'compensation' paid directly or indirectly to a referring physician. The statute's exceptions then identify specific transactions that will not trigger its referral and billing prohibitions. In order to avoid the referral and billing prohibitions in the statute, a hospital's financial relationship with a physician must fall into one of the exceptions.").

provided while on call by the patients he treated and their insurers. Sambasivan does not dispute that this standard hospital emergency call arrangement was completely legal. Further, he apparently does not contest that a hospital's payment for services (such as a call stipend) without a signed, written agreement of at least one year's duration is illegal under both federal and state law if the hospital has billed Medicare or Medicaid for services that were referred by the physician to the hospital. Thus, Sambasivan cannot dispute that what he asks the court to do—imply a contract and order payment—is to convert a perfectly legal call coverage arrangement into an illegal one, based on notions of “fairness” that find no support in the trial court's record.

Further, Sambasivan does not and cannot argue that the parties were unmindful of the requirements of the law at the time the arrangement existed. The uncontroverted record evidence is that both parties knew of and communicated with each other about the Stark laws and its applicability to Sambasivan's relationship with Kadlec well before the time period for which Sambasivan claims unjust enrichment. For example, in a July 2004 letter regarding newly-issued regulations implementing the Stark law, Kadlec reminded Sambasivan that “The ... Stark ... regulations are applicable to virtually all physician/hospital arrangements in which the physician and the hospital have a financial relationship, including professional services ...

agreements.” (Trial Tr. at 85:15-88:2; Def. Exhibit 20 (Letter from Kadlec to Sambasivan dated July 1, 2004)) In addition, two Kadlec administrators testified regarding their awareness of the Stark law’s requirements and specifically, the need for a written agreement of at least one year’s duration before paying compensation to a referring physician. (Trial Tr. at 126:19-127:3, 134:13-22, 140:3-7, 162:2-163:9, 163:24-166:23, 167:21-169:20)

Sambasivan’s brief cites no case, statute or equitable doctrine to justify equitable recovery where the remedy would convert a wholly lawful arrangement into one expressly forbidden by federal and state statutes. Further, Sambasivan does not contest that Kadlec’s payment to Sambasivan for on-call emergency services for work performed without a signed, written agreement which set a fair market value payment and was of at least one year duration would have violated the Stark law and its state law counterpart.

Instead, Sambasivan tries to avoid the obvious import of these laws by arguing that their “clear purpose” “is to prevent improper referral relationships among health care providers,” and that “[n]othing of that kind is found in this case.” Reply Brief at 13. Whether the circumstances here were among those that the legislators originally intended to condemn, however, is irrelevant where the statutes impose strict liability on violators: the laws forbid billing Medicare and Medicaid for services referred by a physician to a hospital where the entities have a prohibited financial arrangement and no

exception applies. Whether the parties intended to violate Stark, or intended to make or reward improper referrals in a manner that Sambasivan divines is inconsistent with legislative intent, is irrelevant. *See* Cross-Appellant's Br. at 46 n.32. Indeed, the uncontroverted testimony was that Kadlec recognized that the law created strict liability, its violation would trigger severe penalties (treble damages and civil monetary penalties), and that it must be mindful of these laws when considering whether to offer a contract for a call stipend to Sambasivan. (Trial Tr. at 163:4-9)

Under Washington law, the courts generally will not enforce an agreement that is illegal and contrary to public policy. *Morelli v. Ehsan*, 110 Wn.2d 555, 561-562 (1988), 756 P.2d 129 (1988). With illegal arrangements, "the parties are left where the court finds them regardless of whether the situation is unequal as to the parties." *Id.* at 562. In equity, only a party not *in pari delicto*³ may maintain an action based upon the illegal contract. *Id.*

Washington courts will not abide challenges in equity for unjust enrichment where the plaintiff is aware of the statute that renders the conduct illegal. *Red Devil Fireworks Co. v. Siddle*, 32 Wn. App. 521, 526-27, 648

³ "The maxim '*in pari delicto potior est conditio defendentis*' declares that the defendant will prevail when the parties are of equal guilt." *Goldberg v. Sanglier*, 96 Wn.2d 874, 882, 647 P.2d 489 (1982).

P.2d 468 (1982). In *Red Devil Fireworks*, the plaintiff sought payment for illegal shipments of fireworks based upon an unjust enrichment theory, as the underlying agreement was illegal and thus unenforceable. The court refused to find unjust enrichment where “both parties were aware of the defendants’ lack of a proper license, and plaintiff was most certainly aware of the statute in question ... [and] plaintiff was not justifiably ignorant of particular regulations that only the defendants knew.” *Id.* at 526-27.

In this instance, Sambasivan was on notice—in writing—of the Stark laws, which he was told governed all aspects of any financial relationship he might have with Kadlec, and would plainly forbid an unwritten personal services agreement in which Kadlec paid Sambasivan. Therefore, it cannot be said that maintaining the status quo—where Sambasivan derives payment for the call services solely from patients and insurers, and not from Kadlec—is unjust. Indeed, this case provides a far weaker basis for equitable relief than the typical unjust enrichment case. In the typical case, the plaintiff seeks a remedy in spite of the illegality of the underlying arrangement. *See Morelli*. Here, the plaintiff seeks an equitable remedy in spite of a perfectly lawful arrangement (and one that already provided him with compensation), and that equitable remedy that would require an illegal payment.

At the very least, the parties’ awareness of the need for a signed, written contract of at least one year’s duration, and the fact that Sambasivan

already received compensation for taking call, preclude a finding that any alleged enrichment was “unjust,” triggering an extraordinary equitable remedy. Although the trial court (wrongly) referred to Sambasivan’s call as “uncompensated,”⁴ it is undisputed that Sambasivan derived direct economic benefit from taking call, both from payments he received for his emergency room services, and for follow-up visits with such patients in his private practice. (Trial Tr. at 39:17-40:10, 95:19-96:3, 97:2-21) Under these circumstances, the trial court’s conclusion that Kadlec derived unfair enrichment, particularly where the parties were aware of the applicable legal constraints, is inappropriate.

B. Sambasivan Fails to Rebut the Fact that the Trial Court Lacked Substantial Evidence to Support Its Finding of Unjust Enrichment or Explain Why Its Holding Does Not Jeopardize Emergency Call Coverage Arrangements Common Throughout the State.

Arguing that the trial court had substantial evidence upon which to find unjust enrichment, Sambasivan identifies only (1) internally inconsistent hearsay evidence attributed to a single member of Kadlec hospital administration who was asked whether Sambasivan could take call after

⁴ This finding is irrational given uncontroverted testimony that he was paid by patients and insurers for professional services provided in the emergency department, and also frequently saw emergency room patients later in his own private office for follow-up appointments. Cross-Respondent’s Brief at 25 (citing CP 883:23-22 (Conclusion of Law #2)).

relinquishing his privileges, and (2) testimony of another administrator whom Sambasivan approached regarding a stipend for interventional cardiology call. Cross-Respondent's Brief at 15.

There is no evidence in the record that the hospital benefitted by Sambasivan taking call any more than any hospital derives from any staff member who takes call as a condition of holding hospital medical staff privileges. Indeed, the only evidence of "benefit" in the trial record was the benefit that accrued to other interventional cardiologists, as they needed to cover fewer days in the emergency department once Sambasivan was added to the call rotation. (CP 916) There was absolutely no evidence that Sambasivan's failure to participate on the call schedule (had he refused to take interventional call without pay) would have left Kadlec without coverage or would have forced Kadlec to find outside coverage. Indeed, the evidence was to the contrary, as Sambasivan took long periods off from call when he relinquished his interventional privileges after questions were raised as to the quality of his services. (Trial Tr. at 36:14-37:12) During those times, other interventional cardiologists on staff filled out the call rotation; no outside coverage was needed. *Id.*

Nor does Sambasivan address the trial court's failure to support its conclusory finding that Kadlec "knew and appreciated" any such benefit it derived from the on-call arrangement. (CP 916-17) For example, there was

no evidence that Sambasivan threatened to stop taking emergency department call unless he was paid, or that it sought to replace Sambasivan with a paid “locums tenens” physician during the long stretches of time when he did not take call because he relinquished his privileges.

Sambasivan also fails to address how Kadlec could have known or appreciated any benefit where it derived no consideration from Sambasivan that justified a call stipend in the first instance. The call coverage contract, for example, requires the physician to support Kadlec’s efforts to become a regional referral center for emergent issues, which entails the physicians assuming a much larger call coverage burden. (CP 482, Sec. 1.5) Nor is the trial court’s finding rational when viewed in light of the hospital’s reluctance to rely upon Sambasivan’s availability to take call given his history at the hospital, particularly the voluntary revocation of his interventional cardiology privileges that preceded and followed the time period for which he seeks payment. *See* Cross-Appellant’s Brief at 52-53.

Further, as indicated above, there is a substantial question as to whether there can be anything unfair about parties complying with their obligations under the federal and state Stark laws. In this instance, Kadlec did not believe it could or should pay Sambasivan without a written contract, and had reasonable concerns about offering him a written contract when asked about a call stipend. Yet Sambasivan provided the services anyway,

knowing the law's constraints, and collecting undetermined sums from the patients he saw and/or their insurers. There is nothing inherently unfair about the arrangement.

The Court is effectively being asked to conclude that it is always unfair to not pay a physician a stipend for taking call coverage, so long as it pays some physicians to take call. The uncontroverted evidence is that the national hospital industry generally does not pay for emergency call coverage, and physicians instead look solely to patients and insurers for payment. Trial Tr. at 144:17-19. Indeed, many hospitals require all active medical staff members to provide call coverage without pay from the hospital as a condition of holding medical staff privileges. *Id.* The trial court's holding turns this system on its head, as it gives any physician with whom a hospital has not entered a contract a basis to demand payment in "equity."⁵

⁵ The "fairness" issue of whether Kadlec paid some physicians but not others to provide interventional cardiology call is a red herring, as the contracts through which payments were made indisputably imposed obligations on the contracting physicians that other members of the medical staff did not have. (Trial Tr. at 231:18-24; CP 482 at ¶1.5) Moreover, as noted above, there is nothing unfair about the hospital's recognition that it could not rely upon Sambasivan to provide the services for any length of time, especially for the minimum one year required by the Stark law.

C. This Court Should Consider Kadlec's Appeal on the Merits and Not Dismiss it Based on Technical Compliance with RAP 10.3(g), Particularly Where the Cross-Appealed Findings of Fact Were Clearly Disclosed.

Sambasivan seeks to prevent this Court's review of the challenged trial court factual findings because the cross-appealed findings of fact were not identified by paragraph number. Rule 10.3(g) provides:

A separate assignment of error for each finding of fact a party contends was improperly made or refused must be included with reference to the finding or proposed 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.

Sambasivan also challenges the lack of specified challenges to the trial court's findings of fact relative to the attorney fees award to him in relation to the call coverage claim. Cross-Respondent's Response Brief at 21-22.

The challenged factual findings are not identified in Kadlec's brief by paragraph number. However, those findings are clearly identified in each instance by quoted language from the findings and citations to the corresponding page(s) from the certified record of proceedings where each finding can be found. *See, e.g.*, Cross-Appellant Brief at 49-51, 53, 56-58, 61, 64-68, 70-71. The challenged attorney fee award factual challenges are identified by both the record page numbers, and reference to the itemized objections that Kadlec identified in the record below. *Id.* at 64, nn.39-40.

Thus, the assigned errors are clearly disclosed and the Court and cross-respondent should be able to readily identify the corresponding findings of fact subject to challenge. To ensure that there is no confusion, attached at Appendix A is a reprint of the cross-appeal section of Kadlec's brief with the findings of fact paragraph numbers added to the page numbers previously cited.

Technical noncompliance with the RAP 10.3(g) should not prevent the Court from reviewing the matter on the merits. RAP 1.2(a) provides:

These rules will be liberally interpreted to promote justice and facilitate the decision on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands

“Technical violation of the rules will not ordinarily bar appellate review where justice is to be served by such review ... [and w]here the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, [this court] will consider the merits of the challenge.” *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979). *See also State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981); *Nat'l Fed. Retired Persons v. Ins. Comm'r*, 120 Wn. 2d 101, 116, 838 P.2d 680 (1992).

Likely because the findings are readily discernible from the cross-appeal brief, Sambasivan fails to identify any compelling circumstance where justice would demand that the Court ignore the quoted, page-identified and

referenced findings subject to challenge here. Thus, consistent with RAP 1.2(a) and the clear disclosure provision of RAP 10.3(g), the Court should consider the identified trial court fact-finding errors.

D. Attorney Fees and Costs Should Not Have Been Awarded to Sambasivan. Alternatively, the Amount Awarded Was Unreasonable.

Sambasivan's response to Kadlec's appeal of his attorney fee award is easily addressed. First, the trial court found that he was entitled to an award based upon unspecified "principles of equity" (CP 899; Conclusion of Law #3) and also based upon RCW 49.48.030, a statute indisputably governing cost-shifting in employment cases. Neither basis applies.

Washington courts do not permit cost-shifting in litigation unless a contract, statute or recognized ground in equity permits it. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). As discussed in the cross-appeal brief (at 62) and undisputed by Sambasivan, the only grounds in equity "recognized" for cost-shifting are bad faith, equitable indemnity, common fund, and dissolution of an injunction, none of which are at issue here. The Washington Supreme Court has expressly rejected claims for cost-shifting based upon unjust enrichment or *quantum meruit*. *Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995); *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 776 P.2d 681 (1989).

In response to this authority, Sambasivan cites to three cases which merely recite the general proposition that, for certain equitable causes of action, cost-shifting is within the trial court's discretion (indeed one of the cases affirmed denial of attorney fees). *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947). Citation to these general pronouncements, of course, does not address established Washington precedent that unjust enrichment is not a recognized ground in equity for awarding attorney fees and costs, or that a judicially-recognized ground in equity is a necessary predicate for the award. Sambasivan provides no further justification for veering from this precedent, and there is none.

Sambasivan's statutory basis for his attorney fees claim, RCW 49.48.030, was never mentioned in any iteration of his complaint, presumably because Sambasivan never claimed to have an employment relationship with Kadlec or that Kadlec owed him "wages or salary." Indeed, the terms "employment," "salary," and "wages" were not mentioned during the trial in connection with Sambasivan's relationship to Kadlec. Nor did Sambasivan introduce any evidence that Kadlec was his employer.

The trial court nevertheless awarded attorney fees to Sambasivan despite having never found that Kadlec was Sambasivan's "employer or

former employer,” as required by the plain language of the statute.⁶ “Statutes must be interpreted and construed so that all the language used is given effect.” *Bates v. City of Richland*, 112 Wn. App. 919, 940, 51 P.3d 816 (2002).

RCW 49.48.030 is found in the statutory title governing Washington’s labor regulations intended to protect employee rights related to their wages.

The statute provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorneys’ 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.

Id. (emphasis added). As a matter of basic statutory construction, the language of the statute must be evaluated in the context of the entire statute. *Ellerman v. Centerpoint Prepress Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001).

The statutory language makes clear that the legislature intended to allow assessment of fees against current or former employers only. If fees may be assessed against a non-employer, the express language selected by the legislature is read out of the statute. As the Supreme Court explained, the

⁶ Such a finding would have been strange, indeed, as independent, non-employed physicians like Sambasivan treat patients who present to the emergency room department without supervisory oversight by the hospital other than through ordinary medical staff peer review quality controls.

salutary purpose of the statute attached to employees:

We have previously recognized Washington's long and proud history of being a pioneer in the protection of employee rights. The Legislature evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payments of wages. [A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights.... Furthermore, remedial statutes should be liberally construed to advance the Legislature's intent to protect employee wages and assure payment. Therefore, the terms of RCW 49.48.030 must be interpreted to effectuate this purpose.

Int'l Ass'n of Firefighters, Local 46 v. City of Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (emphasis added).⁷

Washington courts have rejected the application of the statute to non-employers. In *City of Kennewick v. Board for Volunteer Firefighters*, 85 Wn. App. 355, 370, 933 F.2d 423 (1997), Judge Brown, writing for a unanimous Division Three panel, rejected a volunteer firefighter's claim for attorney fees under the statute in conjunction with a pension benefits claim:

The City and volunteers request an award of attorney fees, citing RCW 49.48.030. That statute authorizes assessing an employee's

⁷ The Court's ruling in this case does not operate in derogation of Kadlec's argument or the language of the statute, contrary to Sambasivan's suggestion. There, the Court permitted an award of attorney fees to a union representing employees in a wage dispute with the employer, based upon the "any person" language in the statute. 146 Wn.2d at 45-46. As the court of appeals noted, "the Legislature's word choice [of 'any person'] indicates that it was concerned primarily with assessing attorney fees *against an employer*, rather than with who in fact incurs the cost of legal representation." 101 Wn. App. 743, 746, 6 P.3d 50 (2000).

attorney fees against an employer in a successful action to recover wages. The statute does not authorize an assessment of attorney fees against a party who is not an employer. The attorney fee request is denied.

In *Bates v. City of Richland*, 112 Wn. App. 919, 939, 51 P.3d 816 (2002), Division Three also confirmed that the statute applies only in the context of employment. There, the court said that liberal construction of the statute should be “construed in favor of the employee,” in order to “advance the Legislature’s intent to protect employee wages.” *Id.* (emphasis added). The Court further stated that “[a]ttorneys fees are recoverable under RCW 49.48.030 whenever a judgment is obtained for any type of compensation due by reason of employment.” *Id.* at 940 (emphasis added). *Bates* also clarified that the “wages” due were those related to employment as it applied the definition or “wage” found in RCW 49.46.010(2), which defines “wage” as compensation due to an employee by reason of employment. *Id.* at 939-940. Further, in *Warren v. Glascam Builders*, 40 Wn. App. 229, 231, 698 P.2d 565 (1985), *overruled on other grounds*, *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 733 P.2d 960 (1987), the court held that the failure to timely plead the claim deprived the defendant of an opportunity to “introduce [] evidence that [plaintiff] acted as an independent contractor,” thereby rendering the statute inapplicable.

Finally, as discussed in more detail in Kadlec's opening brief, Sambasivan's reliance upon *Wise v. City of Chelan*, 133 Wn. App. 167, 135 P.3d 951 (2006) is not persuasive. That case is factually distinguishable as it involved someone who was tantamount to an employee who received what the legislature referred to as "salary." Sambasivan quarrels with Kadlec's citation to a Ninth Circuit case (published in the Federal Appendix) that questioned the holding in *Wise* because it ignored the "assessed against [an] employer or former employer" language of RCW 49.48.030. *Leslie v. Cap Gemini Am., Inc.*, 319 Fed. Appx. 689, 691 (9th Cir. 2009). A reviewing Court can reach the same conclusion that the Ninth Circuit did in *Leslie* without referring to that case, however, as the language in the statute and the court of appeals decisions discussed above speak for themselves.

Consequently, even if Sambasivan prevails on his unjust enrichment claim, he has no statutory or equitable entitlement to fees and costs on that claim.

Second, Sambasivan offers no substantive challenge to Kadlec's arguments that the amount of fees the trial court awarded was unreasonable. Again, he cites to RAP 10.3(g) and Kadlec's failure to cite to specific finding of fact paragraph numbers in its appeal brief. As discussed above, that technical issue should not preclude review on the merits, as the specific

challenges were clearly cited from the opening brief (and are now identified by specific paragraph number on Appendix A).

Accordingly, regardless of the court's determination of the unjust enrichment claim, the trial court's award of fees and costs to Sambasivan should be reversed.

III. CONCLUSION

For the reasons above, in addition to the reasons set forth in Kadlec's opening brief, Kadlec requests that this Court reverse the trial court's finding of unjust enrichment associated with providing emergency department call coverage and, in any event, reverse the award of attorney fees and costs to Sambasivan.

DATED this 23rd day of January, 2012.

BENNETT BIGELOW & LEEDOM, P.S.

By 

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 23rd day of January , 2012, I caused a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT KADLEC MEDICAL CENTER TO APPELLANT/CROSS-RESPONDENT VENKATARAMAN SAMBASIVAN to be delivered via U.S.

Mail to the following counsel of record at his last-known address:

Counsel for Appellant/Cross-Respondent:

Michael de Grasse
59 South Palouse Street
Walla Walla, WA 99362

DATED this 23rd day of January, 2012, at Seattle, Washington.


Franny Drobny, Legal Assistant

No. 86177-3

Appeal from Benton County Cause No. 08-2-01534-1

SUPREME COURT OF THE STATE OF WASHINGTON

VENKATARAMAN SAMBASIVAN, an individual,

Appellant/Cross-Respondent,

v.

KADLEC MEDICAL CENTER, a corporation,

Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
KADLEC MEDICAL CENTER TO
APPELLANT/CROSS-RESPONDENT
VENKATARAMAN SAMBASIVAN

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Id. Neither *Marassi* nor any other authority²⁹ supports Sambasivan's unprecedented notion that two distinct fee awards simply cancel out entitlement to each.

Accordingly, the trial court properly awarded attorney fees to Kadlec and properly rejected Sambasivan's position that neither party should be awarded fees because both prevailed on separate claims.³⁰

VI. ARGUMENTS ON CROSS-APPEAL

A. The Trial Court Erred in Finding Sambasivan Was Entitled to Payment for Call Coverage Under a Quasi-Contract Theory.

1. Standard of Review

Review of a bench trial decision is a two-step inquiry: (1) whether substantial evidence supports the trial court's challenged findings of fact; and (2) whether those findings of fact support the court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Conclusions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

²⁹ *Sardan v. Morford*, 51 Wn. App. 908, 756 P.2d 174 (1988) is similarly inapposite as an application of a contractual prevailing party clause.

³⁰ As argued below, Sambasivan is not entitled to attorney fees in the first instance for prevailing on an implied breach of contract claim, as there is no basis for awarding fees in statute, equity, or contract.

2. The Trial Court's Ruling Does Not Take Into Account the Federal Stark Law, Which Renders the Implied Contract Payments Illegal.

Although Kadlec extensively briefed the Stark law regulatory issue at summary judgment and in its trial brief, the trial court's conclusions of law do not address the application of the federal physician self-referral law, commonly known as the "Stark law," to Sambasivan's implied contract theory. That law and its state law analogue, prohibit the payment of compensation by a hospital to a physician in the absence of a written contract where the physician refers Medicare and Medicaid patients to the hospital. 42 U.S.C. § 1395nn; RCW 74.09.240(3).

The Stark law prohibits a hospital from submitting Medicare claims for payment for certain services (including inpatient and outpatient hospital services) that are referred by a physician who has a "financial relationship" with the hospital, unless a statutory or regulatory exception applies. 42 U.S.C. § 1395nn.³¹ "Financial arrangement" includes a compensation arrangement between the physician and a hospital. *Id.* § 1395nn(a)(2). A physician or entity that enters into a relationship that violates Stark is subject to severe penalties and fines, including repayment

³¹ "The oft-stated goal of the [Stark] Act is to curb overutilization of services by physicians who could profit by referring patients to facilities in which they have a financial interest." *United States ex rel. Kosenke v. Carlisle HMA, Inc.*, 554 F.3d 88, 95 (3d Cir. 2009) (internal quotations and citation omitted).

of all Medicare services referred to the hospital by the physician. *Id.* “The Stark law is a strict liability statute, which means proof of specific intent to violate the law is not required.”³² Washington State law has an identical prohibition relating to Medicaid services, which incorporates the federal law exceptions. RCW 74.09.240(3).

Compensating Sambasivan for furnishing call services would plainly constitute a “compensation arrangement” between a hospital and physician. Because Sambasivan refers Medicare and Medicaid patients to Kadlec (CP 170; Trial Tr. at 83:19-24), such an arrangement is permissible under Stark (and state law analogue) only if the requirements of a Stark exception are satisfied. The relevant exception here, the exception for “personal service arrangements,” requires, *inter alia*, that “the arrangement is set out in writing, signed by the parties, and specifies the services covered by the arrangement.” 42 U.S.C. § 1395nn(e)(3)(A)(i) (emphasis added).

Because this exception requires a signed, written agreement, this exception cannot be satisfied by an implied agreement to pay Sambasivan for call services. *See Kosenske*, 554 F.3d at 96–98 (Stark law implicated in part because no written contract existed covering the services for which

³² HHS-OIG, A Roadmap for New Physicians, Fraud & Abuse Laws, *available at*: <http://oig.hhs.gov/compliance/physician-education/01laws.asp>.

payment was made by hospital to a referring physician group); *see also* <http://www.whidbeynewstimes.com/news/37937489.html?period=W&mpStartDate=09-07-2011> (newspaper article describing Whidbey General Hospital's recent self-disclosure of Stark law issues to the federal government, which included the fact that "the hospital compensated physicians for call coverage without the existence of a written agreement") (Addendum).

As noted above, as soon as the parties executed a signed written agreement that met all of the Stark requirements for a "personal service arrangement," Kadlec began paying Sambasivan for interventional call coverage services in April 2007. Compelling the hospital to pay him prior to such an agreement being in place (particularly where he lacks even an equitable basis to assert a right to payment, as discussed below) would force the hospital to enter into a financial arrangement that is forbidden by both federal and state law.³³ Because the Stark law is a strict liability statute, ordering Kadlec to pay Sambasivan under this claim would be

³³ The trial court noted that some physicians received payment for call for brief periods of time before their written agreement took effect, or were signed. (CP 878 (FOI NA); CP 980) Evidence of retroactive payments authorized for physicians who had already entered into written and signed contracts is irrelevant to a claim for payment where no written agreement has ever existed covering the period in question.

illegal. Therefore, in addition to lacking any substantial basis in fact, Sambasivan's implied contract claim fails as a matter of law.³⁴

3. The Trial Court's Findings That Sambasivan Established the Elements of an Unjust Enrichment Claim Are Not Supported by Substantial Evidence.

In addition to the Stark law illegality issue, the trial court's judgment must also be reversed because its findings as to the elements of unjust enrichment are not supported by substantial evidence. Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party where, absent any contractual relationship, notions of fairness and justice require such recovery. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). To recover under an unjust enrichment claim, Sambasivan must show that (1) Kadlec received a benefit from him, (2) Kadlec appreciated or knew of the benefit, and (3) the circumstances make it unjust for Kadlec to retain the benefit without payment. *Id.* at 484-85. The trial court's findings of fact relative to each of the unjust enrichment elements are not supported by substantial evidence and therefore should be reversed.

³⁴ The trial court's ruling never offered any explanation as to why it ignored this issue, despite the fact that it was repeatedly argued.

a. No Substantial Evidence That Sambasivan's Taking Uncompensated Call from July 1, 2005 to October 26, 2006 Conferred a Benefit on Kadlec.

The trial court concluded that “[b]y providing call coverage on the defendant’s emergency call coverage list, the plaintiff provided an economic benefit to the defendant.” (CP 915, **POF #26**) None of the cited evidence supports this finding. First, the trial court cites to testimony (from Dr. Ravage) that Sambasivan’s taking call during this period “lightened the load of the other interventional cardiologists, by providing them a better opportunity to rest.” (CP 916, **POF #26**) This is a benefit to the other cardiologists (none of whom are employed by Kadlec), not a benefit enjoyed by the hospital. (Trial Tr. at 37:3-12) The additional finding that “[w]ithout sufficient physicians to provide these services, the defendant must hire from outside the area to provide these services,” *id.*, also does not support a finding of a “benefit” to Kadlec, as there was no evidence whatsoever that Kadlec had difficulty finding a sufficient number of interventional cardiologists to take call. In fact, Dr. Ravage provided uncontroverted testimony that the other interventional cardiologists shared call during the times that Sambasivan relinquished his clinical privileges, and no testimony was offered that the hospital was forced to “hire from outside the area” when Sambasivan was not taking call. (*Id.* at 36:14-37:12)

The court's additional finding that Kadlec "would have had to pay other physicians for providing services that were provided by [Sambasivan]" (CP 916, **FOI #20**) is also speculative and without an evidentiary basis. No Kadlec executive or officer testified as to this proposition. Kadlec was under no independent obligation to pay any medical staff physician to take call; the only evidence before the court on this point was that each medical staff member was required by the Bylaws to take call, without compensation from the hospital. (CP 388, 431)

b. No Substantial Evidence That Kadlec Knew and Appreciated Any Benefit Conferred By Sambasivan's Uncompensated Call.

The trial court's findings of fact do not identify any evidence in support of the second element of unjust enrichment. They state, with no elaboration, that "[t]he above-described benefit conferred by the plaintiff on the defendant was known and appreciated by the defendant," and, that "[t]he defendant was aware that it received considerable value by reason of interventional cardiologists' provision of call coverage services." (CP 916-17, **FOI #20**) The only evidence that could possibly be cited to support these conclusions, however, are the findings that one former Kadlec executive, Suzanne Richins, was aware that Sambasivan was added to the call coverage roster in 2005, and that Sambasivan "on several

occasions” approached another Kadlec officer, William Wingo, and asked to be paid for call. (CP 916, (FOI #2))

The finding concerning Richins’ knowledge of the call schedule (FOI #2) is clearly erroneous, and in any event does not support Kadlec’s knowledge of any benefit of receiving call services without paying for them. Richins did not testify at trial nor was she deposed. The only evidence offered as to her knowledge and authorization of Sambasivan being placed on the call schedule following the restoration of his privileges was testimony of former Kadlec Chair of Cardiac Services Christopher Ravage, who testified that he asked Richins for permission to add Sambasivan to the call schedule in July 2005 and “[s]he said yes.” (Trial Tr. at 31:22-32:11) Dr. Ravage also testified, however, that he did not know whether Richins thought Sambasivan was being paid for call coverage. (*Id.* at 32:12-15) He testified that later in 2005, he ran into Richins who asked him “how long Dr. Sambasivan had been taking call and why.” (*Id.* at 37:17-26) He stated that she “seemed to have no recollection of” their earlier conversation about adding him to the call schedule. (*Id.* at 37:38:2-3) He also testified that he did not speak to any other member of the Kadlec administration about Sambasivan taking call. (*Id.* at 38:4-7)

As to the finding concerning Sambasivan's conversations with Wingo about being paid for call (FOI 428), the evidence consists of testimony from Sambasivan (both at trial and in his published deposition) and Wingo regarding their conversations. None of this testimony could lead a rational finder of fact to conclude that Kadlec "knew and appreciated" any benefit that was being conferred to it by not compensating Sambasivan for taking call between July 2005 and October 2006, particularly where these individuals testified that:

- Sambasivan never sent Kadlec an invoice for payment. (Trial Tr. at 106:9-16)
- Sambasivan never told Kadlec he would not take call unless he was paid, or gave Kadlec a deadline for offering him a contract. (*Id.* at 238:3-11)
- The Cardiac Services Chief, Dr. Ravage, testified that he never spoke to anyone at Kadlec concerning lack of payment to Sambasivan, even though he knew Sambasivan was providing call services. (*Id.* at 38:4-7)
- Physicians at Kadlec did not receive compensation for taking call unless they had signed a contract, with concomitant contractual

obligations to the hospital,³⁵ and submitted requests for payment. (*Id.* at 231:18-24)

- During the time frame that Sambasivan took call, the Kadlec Board was re-evaluating the payment-for-call program in general. Wingo, who was responsible for physician contracting at Kadlec, testified that the Board's discussions raised doubts as to whether he would be able to enter into a contract with Sambasivan for a term of at least a year, which is a requirement under the Stark law. (*Id.* at 236:11-237:19)

- Although Sambasivan's interventional cardiology privileges were reinstated sometime in 2005, which permitted him to take call, he was subject to a further review of his clinical care by an outside reviewer, which was to occur six months following reinstatement. (*Id.* at 234:16-236:4) Wingo testified that the pendency of this outside review was relevant in deciding whether to enter into a contract with Sambasivan to pay him for call, particularly over the one-year timeframe required by the Stark law. (*Id.* at 182:3-13; 184:2-7; 235:11-14)

³⁵ For example, call coverage contracts required physicians to "participate in, cooperate with and support the Medical Center's Transfer Center, its policies and procedures, including the transfer coordination process via conference call and respond to the Transfer Center in a timely manner." (CP 482)

c. No Substantial Evidence That Not Paying Sambasivan for Emergency Department Call Would Be Unjust Under the Circumstances.

Like the second element of unjust enrichment, the findings of fact cite no evidence supporting the finding that “the acceptance and retention of the benefit of the plaintiff’s professional services provided to the defendant is inequitable.” (CP 918, ~~ROP 30~~) Even if the trial court could conclude that Sambasivan established the first two elements of an unjust enrichment claim, it offered no explanation as to how leaving the parties where they stand would be unjust under the circumstances.

At most, the findings suggest that Sambasivan was “treated unfairly” because Kadlec did not approach him and offer him a contract to pay him for emergency department call when his privileges were restored and his privileges were restored in 2005. While other interventional cardiologists were paid for taking call during this time period, the trial court’s finding is manifestly unreasonable in light of the substantial evidence that explained why Sambasivan was not offered a contract, and why, therefore, failure to pay him was not unjust. In addition to the circumstances noted above, the testimony shows:

- When the other cardiologists signed contracts, carrying obligations that Sambasivan had not undertaken, Sambasivan had no interventional cardiology privileges, having previously

relinquished them, and therefore was ineligible to be included on a call schedule for interventional cardiology. In addition, when Sambasivan first approached Wingo about a call coverage contract in the fall of 2005, Wingo was not certain whether Sambasivan's interventional privileges had been restored. [*Id.* at 180:8-16]

- Historically, Kadlec never paid physicians for taking call. It was not until certain physician specialists began demanding payment for call in late 2004 that the Kadlec Board decided to pay certain physicians for call, if and only if they signed contracts in which they agreed to support certain hospital endeavors and offered other consideration. (CP 482 (call contract, § 1.5)) Cardiologists were not among the groups of physicians demanding payment for call.
- Sambasivan earned income from treating patients seen in the emergency department by billing patients and their insurers for his services. (Trial Tr. 80:13-19) Call coverage also afforded him the opportunity to develop long-term relationships with new patients.³⁶

Sambasivan could not say how much he earned through that work

³⁶ Sambasivan relied on these future patient relationships garnered from providing call to support his tortious interference claim. See CP 334-40 (discovery responses identifying patients who presented at the Kadlec emergency department needing interventional cardiology services whom he was unable to treat because he lacked interventional cardiology privileges). See also Trial Tr. at 40:11-14 (testimony of Dr. Ravage that patients he sees in the emergency department "usually" come to his office for follow-up care); *id.* at 95:19-96:3 (Sambasivan provides follow-up services in his own office to "quite a few patients" whom he sees in the Kadlec emergency department).

or how that compared to physicians who were paid for call. (*Id.* at 97:13-98:9)

- Sambasivan's privileges were under review after he had voluntarily relinquished them, and even when he was reinstated, additional external reviews of his clinical care were pending, casting doubt on whether he would continue to have acute interventional privileges into the future, and therefore whether the hospital could enter into a contract that it believed in good faith would be at least a year in duration (a regulatory requirement under the Stark law, discussed above). (*Id.* at 180:2-185:24; *see also id.* at 144:17-145:17).
- Sambasivan, before filing a lawsuit, never demanded to be paid for call during the relevant time frame, never sent Kadlec an invoice for his call services, and never stated he would not provide call unless he was paid. (*Id.* at 103:21-106:16)
- Sambasivan was required, as a member of the Kadlec medical staff, to take call without compensation. (CP 388)
- Sambasivan was given a contract to be paid for call when his privileges were reinstated for the second time in April 2007 and he was no longer under review. (CP 481)

- Sambasivan took uncompensated call at another area hospital, Lourdes Hospital, and didn't begin receiving payment for call at Lourdes until after Kadlec started paying him for call. (*Id.* at 242:9-20)

* * *

The trial court's finding of unjust enrichment also sets a dangerous precedent on a more global basis. It compels a finding that any physician who takes uncompensated call is entitled under a *quantum meruit* theory to be paid for taking call, so long as the hospital pays some physicians for taking call. This would vitiate a hospital's freedom to contract with physicians of its choosing, and would nullify standard hospital bylaw requirements that staff members take emergency department call without compensation.³⁷ Finally, as discussed above, the trial court's analysis would force hospitals to make payments to physicians who lack written contracts in violation of the Stark law and the equivalent state statute, which imposes strict liability if a written agreement between the hospital and the physician for the payment of compensation does not exist and the physician refers Medicare and Medicaid patients to the hospital. Essentially, the trial court implied a contract in law that is patently illegal

³⁷ Kadlec, to this day, does not pay all physicians for taking call. (Trial Tr. at 124:21-24, testimony of Kadlec CEO Rand Wortman)

and would be unenforceable on that basis. *Brower v. Johnson*, 56 Wn.2d 321, 325, 352 P.2d 468 (1982).

Under these circumstances, the trial court's factual finding that not paying Sambasivan for taking call between July 2005 and October 2006 is "unjust" is not supported by substantial evidence.

B. The Trial Court Erred in Awarding Sambasivan Attorney Fees for Prevailing on His Call Claim.

Washington courts do not award attorney fees as part of the cost of litigation absent a contract, statute, or recognized ground in equity. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). If none of those three exceptions apply, the court must deny a claim for attorney fees. *See generally Farmers Ins. Co. of Wash. v. Rees*, 27 Wn. App. 369, 617 P.2d 747 (1980). A trial court's decision to award fees and costs is a question of law and is reviewed to determine if the relevant statute or contract provides for an award of fees. *Id.* at 126.

The trial court awarded Sambasivan attorney fees for the call coverage issue based on RCW 49.48.030 and unspecified "principles of equity." (CP ~~333~~, ~~COL 2~~) RCW 49.48.030 provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, 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 (emphasis added).

1. Sambasivan's Alleged Quasi-Contractual Relationship with Kadlec is Not a Relationship That Triggers RCW 49.48.030.

RCW 49.48.030 allows assessment of attorney fees only against an "employer or former employer." *City of Kennewick v. Board For Volunteer Firefighters*, 85 Wn. App. 366, 933 P.2d 423 (1997) (RCW 49.48.030 "does not authorize an assessment of attorney fees against a party who is not an employer."). No evidence was adduced that Sambasivan was Kadlec's employee in any capacity, nor was there any evidence that the other contracted cardiologists were Kadlec's employees for purposes of call coverage.

Wise v. City of Chelan, 133 Wn. App. 167, 135 P.3d 951 (2006), where the court of appeals held that an independent contractor may recover attorney fees, is distinguishable. *Wise* dealt with the narrow question of whether an attorney who had a four-year contract to serve as a municipal judge for the City of Chelan, but whose position was eliminated halfway through the term, could recover attorney fees under RCW 49.48.030 along with lost wages, notwithstanding the fact that she was not an "employee" of the city (her position was created by statute). The court agreed she was entitled under her contract to be paid for the unexpired

term of her appointment and thus, her claim for compensation was “salary” for purposes of RCW 49.48.030.

Wise is inapplicable for two reasons. First, the factual circumstances that led the court to apply RCW 49.48.030 do not exist here. *Wise* actually had a contract to perform services for a fixed term at a set “salary,” which the city breached by cancelling the contract. Because “the legislature consistently used the term ‘salary’ in enacting the statutes governing the compensation of municipal judges,” the court felt that applying RCW 49.48.030 to award attorney fees, which specifically addresses “wages and salary,” was justifiable.

Here, by contrast, Sambasivan’s call payment claim did not involve any contractual relationship, either as an employee or independent contractor. The entire basis of his claim was that no contract existed that required Kadlec to pay him for taking call. Nor is there any authority, such as the statute governing compensation of municipal judges in *Wise*, that supports a characterization of call coverage payments as “wages” or “salary.” Nor was any testimony offered that anyone referred to call compensation as “salary” or “wages,” and the trial court made no findings that support such a characterization.

Second, *Wise* is unpersuasive in that it focuses solely on the “any person” language in RCW 49.48.030, and did not consider the requirement

that attorney fees can be obtained only from an individual's "employer or former employer." As the Ninth Circuit observed:

We [] reject Plaintiff's reliance on the Washington Court of Appeals' decision in *Wise v. City of Chelan*, 133 Wash.App. 167, 135 P.3d 951 (2006). There, the court held that attorney fees may be awarded to "any person," *id.* at 954-55, but it did not consider the text at issue here, which directs that attorney fees may be "assessed *against* [an] employer or former employer," RCW section 49.48.030 (emphasis added).

Leslie v. Cap Gemini Am., Inc., 319 Fed.Appx. 689, 691 (9th Cir. 2009).

As discussed above, Kadlec and Sambasivan did not have the necessary relationship to permit an award of attorney fees under RCW 49.48.030.

Awarding fees under this statute is also improper as no iteration of Sambasivan's Complaint plead RCW 49.48.030 as a basis for recovery. He did not raise the potential applicability of statute until the first day of trial, which did not allow for a meaningful response by Kadlec or adequate time to address his claim or the applicability of the statute. *See Warren v. Glascam Builders, Inc.*, 40 Wn. App. 229, 232, 698 P.2d 565 (1985), *overruled on other grounds by Beckmann v. Spokane Transit*, 107 Wn. 2d 785, 733 P.2d 960 (1987) (upholding denial of fee award because plaintiff, by failing to plead RCW 49.48.030 fee recovery in his complaint, did not allow application of the statute to the case).

2. No “Principle of Equity” Supports a Fee Award in an Unjust Enrichment Case.

The trial court’s decision to award attorney fees was also based on unspecified “principles of equity.” ~~(CP 839, COJ 42)~~ There is no recognized “ground of equity” to award fees here. To recover attorney fees on an equitable claim, Washington courts must recognize the specific equitable basis as a ground for awarding attorney fees. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). These narrowly-construed, judicially-created grounds typically apply only in the area of insurance and bad faith cases where courts have ordered fee-shifting to remedy the perceived inequities in bargaining power between the parties. The recognized grounds are: (1) bad faith, (2) equitable indemnity, (3) common fund, and (4) dissolving an injunction.³⁸ None of these grounds applies here. *See also Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 167, 776 P.2d 681 (1989) (citing with approval the general trend in other jurisdictions to reject attorney fee requests based on theories of unjust enrichment, *quantum meruit* and equitable subrogation); *Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995) (rejecting plaintiff’s claim to attorney fees under his equitable claims of unjust

³⁸ *See, e.g., Brock v. Tarrant*, 57 Wn. App. 562, 789 P.2d 112 (1990) (bad faith); *Brotten v. May*, 49 Wn. App. 564, 744 P.2d 1085 (1987) (equitable indemnity); *Interlake Porsche & Audi Inc. v. Bucholz*, 45 Wn. App. 502, 728 P.2d 596 (1986) (common fund); and *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998) (dissolution of injunction).

enrichment and *quantum meruit* because he failed to provide any legal authority that either of these theories would support such an award).

* * *

Because there is no basis in contract, statute, or equity to award Sambasivan attorney fees for prevailing on his unjust enrichment claim, and no factual findings support such an award, the trial court's decision to award fees should be reversed.

C. The Amount of Fees Awarded by the Trial Court Was Unreasonable (CP 88-39, EOP #16-7).

Even if Sambasivan was entitled to attorney fees as a matter of law, the Court should nevertheless reverse the fee award as unreasonable. The amount of the trial court's fee award is reviewed for manifest abuse of discretion, and may be reversed if the trial court exercised its discretion on untenable grounds or for untenable reasons. *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The trial court must provide an adequate record upon which to review a fee award. *Estrada v. McNulty*, 98 Wn.App. 717, 723, 988 P.2d 492 (1999). In addition, "attorney fees should be awarded only for those services related to the causes of action which allow for fees." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987); see also *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn.App. 841, 847, 917 P.2d 1086 (1995).

Sambasivan's attorney fee request prompted numerous motions, alternative motions, and Kadlec's objections thereto.³⁹ The court held a hearing on attorney fees on August 11, 2010, and issued a Memorandum Decision on March 9, 2011, in which it agreed with a number of Kadlec's objections and ordered Sambasivan to revise his fee petition. Sambasivan's revised fee petition, however, did not comply with the court's instructions, and included mathematical errors. (CP 2036) Notwithstanding these deficiencies, the court awarded the full amount of fees (\$65,978.35) and expenses (\$4,183.82) sought in the revised petition.⁴⁰ (CP 899)

The trial court's award is a manifest abuse in discretion not only for Sambasivan's non-compliance with the court's March 2011 memorandum decision, but also for its inclusion of many time entries lacking proper foundational support. Specifically, the trial court's award did not exclude: (i) time clearly spent on matters unrelated to the call claim (e.g., depositions of witnesses whose testimony was not related to this claim, work done on unrelated and unsuccessful discovery motions, etc.); (ii) entries that failed to carve out time spent on matters unrelated to prosecuting the call claim; (iii) travel time, which the trial court

³⁹ Kadlec's objections included a detailed table listing each of Sambasivan's time entries and its specific objections thereto. (CP 1404-14, 1470-82, 2058-68)

⁴⁰ CP 2051-58.

specifically ordered Sambasivan to remove, but was left embedded in many of Sambasivan's time entries; and (iv) inappropriate costs.

1. Failure to Segregate

Sambasivan is "required to segregate [his] attorney fees between successful and unsuccessful claims that allow for the award of fees." *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 501, 859 P.2d 26 (1993). "If the claims are unrelated, the court should award only the fees reasonably attributable to the recovery." *Id.* at 502 (trial court erred in refusing to award plaintiff fees only for her successful claim). *See also Pham*, 159 Wn.2d at 538-39 (trial court properly declined to award fees for hours spent on an unsuccessful claim).

"The burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such [attorney] fees." *Loefelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 690, 82 P.2d 1199 (2004). Here, Sambasivan made no attempt to segregate his time, even after Kadlec's numerous objections. While his fee petition did not include all work performed for the case, the entries do not reflect any effort to segregate time spent on litigating the call claim from time spent on other (unsuccessful) claims. The trial court's March 2010 Memorandum Opinion (CP 2036) only partially dealt with this deficiency. The court ordered that Sambasivan reduce certain

discovery work to two-fifths of the amount claimed, but only called out “deposition time as well as preparation time and also costs associated with the depositions of Drs. Isaacson, Ravage, Bowers, Schwartz, Hazel, Foss and Rado and Mr. Cowan, Wortman and Savitch and Ms. Campbell.” (CP 2040)

The court did not order Sambasivan to segregate other time entries with ambiguous descriptions that did not specify that the work was performed for the call claim (e.g., “legal research”; “tel con client” “prep deps”). Nor did the court enforce its own instruction that he revise fee requests that clearly included work done on other claims (e.g., “preposition to motion for summary judgment”, “prep IRFP” where there was only one discovery request related to call payments, time spent defending Kadlec’s CR 12 motion to dismiss, and time spent preparing for and attending the summary judgment hearing). *See Pearson v. Schubach*, 52 Wn. App. 716, 724, 763 P.2d 834 (Div. III) (1988) (remanding fee award to trial court where “court failed to distinguish between the attorney fees incurred as a result of the contract action . . . and those which were the result of various tort claims”).

Specifically, the trial court noted that Sambasivan’s adjustments to his time entries relative to the summary judgment motions were inadequate because they did not “include only that portion of his fees

related to the on-call claim.” (CP 2040) Sambasivan only adjusted his fees for two dates (March 18, 2010 and April 1, 2010), and did not make any apportionment to summary judgment work on other dates.⁴¹ Although Kadlec brought this omission to the trial court’s attention, it nevertheless awarded Sambasivan the unadjusted fees.⁴²

2. Failure to Specify Nature of Work Performed

The trial court’s fee award also ignored the fact that Sambasivan’s time records lack any specificity to support the fees, and deprive Kadlec and the finder of fact of the ability to determine whether the work performed is includable. Although the trial court appeared to recognize this deficiency,⁴³ Sambasivan did not augment his time entries as the court requested, and the court ultimately awarded fees based on his counsel’s vague and generic descriptions. For example, entries such as “review of documents”; “legal research”; “consultation with client”; and “tel con client” provide no assurances that the time claimed was devoted exclusively to his call claim, as opposed to his various unsuccessful claims, particularly where his unsuccessful claims predominated in the

⁴¹ Un-adjusted dates include March 6-7, 2010 (4.5 hours), March 10, 2010 (.5 hour), March 12, 2010 (1 hour), March 24, 2010 (.5 hour), March 26, 2010 (4 hours), and March 29, 2010 (1 hour).

⁴² CP 2065-66.

⁴³ Motion for Attorney’s Fees, Verbatim Report of Proceedings (Aug. 11, 2010) at 62: 4-21 (“So I’m going to direct him to review his attorney fees and be more specific in the – in his description of them; for instance, legal research, the same thing. Did it all relate to the wage loss claim or was some of it peer review?”).

litigation. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) (“[A]ttorneys must provide reasonable documentation of the work performed.”). The trial court’s failure to require Sambasivan to meet his attorney fee documentation burden was a manifest abuse of discretion. *Int’l Union of Operating Engineers, Local 286 v. Port of Seattle*, 2011 WL 4912830, -- P.3d -- (Oct. 17, 2011) (attorneys fees denied where attorney failed to provide reasonable documentation of work performed) (Addendum).

3. Inclusion of Unrelated Work

The fees awarded also include time clearly unrelated to his call coverage claim that should have been excluded. See *Travis v. Wash. Horse Breeders Ass’n*, 111 Wn.2d 396, 759 P.2d 418 (1988) (“The Court must separate the time spent on those theories essential to [the cause of action for which attorneys’ fees are properly awarded] and the time spent on legal theories relating to the other causes of action This must include, on the record, a segregation of the time allowed for the [separate] legal theories.”).

Although the trial court asked Sambasivan to properly segregate his time, it ultimately allowed fees for unrelated work, and also let stand time entries that were not apportioned per the court’s instructions. For example:

- Sambasivan's (1) 9-09-08 entry "Prep dep notice and subpoena" (.50 hour); and (2) 11-19-08 entry for "Letter and tel con D. Robbins, preparation of notices of deposition" (.50 hour) should both be reflected at .20 hours given the 40% apportionment ordered by the trial court corresponding to the depositions in question. (CP 2064)

- His 12-3-08 entry for deposition time reflects an improper apportionment. Given the start and end times of the depositions that day, at most his counsel could ascribe 3.0 hours to Sambasivan's deposition (assuming he included lunch in his time entry, which would be odd because the deposition was over before lunch), 1.5 hours to the Savitch deposition, and the rest to travel (there is no entry for deposition prep on that day). Thus, given the time entries, and the demand that travel be backed out, Sambasivan should have reduced the 6.0 hours by 2.40 hours, instead of by .60.⁴⁴

- Sambasivan's two time entries for 3-30-10, which are for unspecified "Legal research; legal research, preparation of objection and memo re: credibility, tel con court, tel con client," are clearly for work which the court ordered to be backed out the fee petition. (CP 2040) ("Plaintiff will not be allowed attorney fees for time allocated to research,

⁴⁴ Sambasivan's fee award is also based upon mathematical errors. For example in his 3-17-09 entry, application of the 40% credit would result in a reduction in time to .20 rather than .30 as he requested.

motion preparation and argument relating to 'strike praecipe' and credibility of Donna Zulauf as it related to by-law provisions concerning the collegial intervention of Plaintiff."'). These two time entries, which combine for 8.0 hours, immediately preceded the hearing on the matter related to the credibility of declarant Donna Zulauf, and as no detail is given of the work that would suggest the time was spent on other issues, the work is not properly includable in the fee petition.

4. Inclusion of Travel Time

In its March 16, 2010 Memorandum Decision, the trial court directed that Sambasivan exclude travel time to and from Walla Walla and the Tri-Cities. Although he adjusted his entries for trial days (to reflect a "flat fee" he charges for trial days), no other time entries with embedded travel time were adjusted. For example, for the day Sambasivan's counsel deposed Rand Wortman and Dr. Foss – depositions that took place in Richland, collectively totaled 2 hours and 20 minutes, and ended at 3:25 in the afternoon, Sambasivan claimed 10 hours of attorney time. Sambasivan never disputed that this entry included travel time, which was the basis for Kadlec's original objection. (CP 1467) At least three hours should be removed from this time entry. Kadlec estimates that at least 20 additional hours of travel time have not been backed out, a fact which is obscured by

Sambasivan's failure to provide reasonably detailed time records. That time should have been eliminated.

5. Fees for Alternative Motion Preparation

Finally, the trial court should not have awarded Sambasivan fees for revising his fee petition to comply with the court's instructions and respond to Kadlec's objections. His final fee petition included an additional 14.5 hours of time for work related to his Alternative Motion re: Attorney Fees and Statement of Counsel, all post-dating the trial court's Memorandum Decision of June 8, 2010, which directed him to back out certain time, and also includes an additional ten hours of time to deal with the revised motion. The trial court's fee award including these 24.5 hours of time was a manifest abuse of discretion.

For the foregoing reasons, the trial court abused its discretion in the awarding fees and costs to Sambasivan in the amount awarded. (C)

336 89. POF 7/16-7)

VII. CONCLUSION

For the foregoing reasons, the Court should (i) affirm the trial court's summary judgment dismissals of Sambasivan's breach of express contact, tortious interference, and retaliation claims; (ii) affirm the trial court's award of attorney fees to Kadlec; (iii) reverse the trial court's

DATED this 17th day of November, 2011.

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Reply Brief of Respondent/Cross-Appellant Kadlec Medical Center to appellant/Cross-Respondent Venkataraman Sambasivan

Case name:

Venkataraman Sambasivan, an individual, Appellant/Cross-Respondent v. Kadlec Medical Center, a corporation, Respondent/Cross-Appellant

Case No.:

Supreme Court No. 86177-3

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Thank you for your assistance in filing this pleading. We look forward to your reply acknowledging receipt.

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