

ORIGINAL

NO. 72855-5-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ERIC R. SHIBLEY, M.D., Appellant,

v.

KING COUNTY HOSPITAL DISTRICT NO. #4 d/b/a SNOQUALMIE
VALLEY HOSPITAL, KIMBERLY WITKOP, M.D. AND RICHARD J.
PISANI, M.D., Respondents.

BRIEF OF APPELLANT

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//

I will call Bob Meals and tell him of our new plan.
Sign the probation agreement AND the CPRJ agreement.
Work to substitute KSAR for PACE
HIRE BOB MEALS
Then petition to get her off probation early.

//

Thanks

THE "ADDENDUM OF TRAINING" ON THE CPRJ AGREEMENT WILL HAVE A LIST OF THE TRAINING THAT WE SUGGEST...

THIS WAY, WE CAN DO IT SEPARATELY AND MODIFY IT AD LIB UP TO THE LAST MOMENT.

I DO EXPECT THIS HOSPITAL TO GET UGLY WITH BETH. WE HAVE ON RECORD ALL OF THESE WONDERFUL LETTERS OF REFERENCE. Now about 20. Soon to be 30.

WE WILL ALSO KEEP HER VIABLE FOR THE FUTURE, NO MATTER HOW THE UNCERTAIN FUTURE PLAYS OUT

WE ALSO BOX IN THE MEC IN ANY DETERMINATION THEY MAY DECIDE TO DO.

ALSO, SHE IS IN A BETTER POSITION FOR OTHER EMPLOYMENT, IN A LITTLE BANDAID STATION, IF NECESSARY.

WE HAVE BOXED IN THE "RISK MANAGER", THE MED MAL TYPE RISK GUY, ALSO if there are concerns regarding her age (59) or quality of care.

WE HAVE AN OPTION TO DO A "BETH SCOTT ACT" REGARDING SAFE HARBORS IN OB.... I will discuss it. We have done, HR 2472 a few years back....

WE HAVE THE OPTION TO GET EARLY END OF PROBATION. She is working with a private entity also and that is must unusual.

WE HAVE THE EVIDENCE FOR THE HOSPITAL CREDENTIAL DEPT AND MEC TO KEEP HER WORKING IN SPITE OF PROBATION, PERHAPS...

Beth is no longer a victim. She, with the help of CPRJ, is fighting.

Richard B. Willner
THE CENTER FOR PEER REVIEW JUSTICE
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I. INTRODUCTION

This case involves an invalid attempt by officials at Snoqualmie Valley Hospital (SVH), a Washington governmental entity, to terminate young Dr. Eric Shibley's medical staff privileges on March 8, 2011 three weeks after the hospital terminated his employment on February 17, 2011 because he allegedly dictated a history and physical report without examining the patient. According to express provisions in the SVH's Medical Staff Bylaws, Dr. Shibley no longer had privileges on March 8, 2011, and the hospital's Medical Executive Committee (MEC) never had any authority to terminate his privileges even if he did still have them. The hospital acted without giving Dr. Shibley any notice or opportunity to defend himself against its allegations called for in its Medical Staff Bylaws before it submitted a false "Adverse Action Report" to the National Practitioner Data Bank on March 14, 2011 informing the entire health care world, including state licensing agencies, hospitals, insurances companies and payors, that it had terminated his privileges for "falsifying records" just two weeks after the parties signed an employment severance agreement in which the hospital had promised not to disparage Dr. Shibley's professional qualifications.

Worse yet, once the hospital realized that its Medical Executive Committee (MEC) lacked the authority to terminate Dr. Shibley's privileges, it tried to cover up its mistake by submitting a second Adverse Action Report to the Data Bank on April 12, 2011, falsely claiming that it

had “summarily suspended” his privileges when there is no evidence that such action ever occurred, or that he was ever afforded any procedural rights that he would have been entitled to if such action had actually taken place. Thus, the hospital’s attempt to justify its action and cover up its mistake constituted a fraud perpetrated on Dr. Shibley. Contrary to its dismissive position, its failure to provide Dr. Shibley any due process whatsoever before it caused serious damage to his constitutionally protected liberty interest in his professional reputation and career by submitting defamatory reports that every hospital, insurance company and payor in the country has access to, did not constitute a “minor procedural error.” To this day, Snoqualmie Valley Hospital has never taken any valid action regarding Dr. Shibley’s former privileges.

Appellant Eric R. Shibley, M.D. is a young board certified Internal Medicine physician whom Respondent Snoqualmie Valley Hospital hired directly out of his residency at Meharry Medical College in Nashville, Tennessee in 2010 to fill one its two hospitalist positions. He is a native of Bangladesh.

Respondents are King County Hospital District #4 d/b/a Snoqualmie Valley Hospital, a small 25-bed governmental facility located in Snoqualmie, Washington, and two physicians who were intimately involved in Dr. Shibley’s brief five-and-a-half month career at the hospital between September 1, 2010 and February 17, 2011. Respondent Kimberly Witkop, M.D. is Vice President of Medical Affairs and Respondent

Richard Pisani, M.D. is SVH's other hospitalist. Although Snoqualmie Valley Hospital is licensed as an acute care hospital, the majority of its admissions are "swing bed" patients admitted for rehabilitation.

This entire case turns on a single hotly disputed material issue of fact: whether Dr. Shibley examined swing bed patient S.T. on the morning of February 9, 2011 before he dictated a history and physical examination (H&P) report that was subsequently found to contain inconsequential inaccuracies regarding her vital signs. Respondents Dr. Witkop and Dr. Pisani claim that in separate conversations with Dr. Shibley on February 16, 2011, he admitted to them that he did not examine patient S.T. on February 9; Dr. Shibley has consistently denied their allegations throughout the course of this litigation. Dr. Witkop decided to abruptly terminate Dr. Shibley's employment on the afternoon of February 17, 2011 based on this allegation, only one day after she had given him a positive performance review and a mentoring plan for the next six months. Dr. Witkop said the reason she fired Dr. Shibley was because he had "falsified a record" by "filing a false H&P" when he documented conducting a patient history and physical without having examined the patient. Dr. Shibley protested and denied falsifying the H&P. He told her he did in fact examine patient S.T. a week earlier on February 9¹ and claimed that the real reason Dr. Witkop fired him was because he and the

¹ During a subsequent peer review hearing three months later, patient S.T. and her husband testified that Dr. Shibley *did* examine her in the morning on February 9, 2011.

other hospitalist, Dr. Richard Pisani, had gotten into a heated argument over their respective care of a different patient, R.B., later in the day on February 16, 2011 and Dr. Pisani decided to quit his hospitalist position because he said he would not work with Dr. Shibley anymore. Thus, Dr. Shibley alleged that Dr. Witkop's reason for terminating his employment on February 17 was simply a pretext for firing him in order to persuade Dr. Pisani to change his mind and continue working at Snoqualmie Valley Hospital.

Dr. Shibley also alleged that when Dr. Witkop terminated his employment, she was retaliating against him because he had exercised his right of free speech when he argued with Dr. Pisani over the care of patient R.B. Dr. Shibley was escorted out of the hospital on February 17, 2011 and never returned to practice medicine there again.

On March 1, 2011, Snoqualmie Valley Hospital and Dr. Shibley signed a Severance Agreement and Release that related solely to the termination of Dr. Shibley's employment relationship with the hospital. The Severance Agreement recited that neither the agreement nor the consideration exchanged would in any way be construed as an admission that either party had acted wrongfully. It also contained a "non-disparagement" provision in which the parties agreed not to disparage one another or make any representations with the intent of damaging the interest of the other in the future.

The Severance Agreement and Release made no reference whatsoever to Dr. Shibley's six-month provisional medical staff privileges that had permitted him to work at the hospital. Dr. Shibley contends his provisional privileges expired on March 1, 2011 pursuant to certain specific provisions contained in Snoqualmie Valley Hospital's Medical Staff Bylaws that expressly provided that his provisional privileges "conclusively terminated" if he was not advanced to either the active medical staff or the courtesy medical staff at the end of the initial six month provisional period, neither of which occurred, and a letter he received from the Chief of Staff dated July 21, 2010 that specifically limited his provisional medical staff appointment to a period of only six months beginning September 1, 2010. Thus, on March 1, 2011, when he signed the Severance Agreement, Dr. Shibley believed the matter was concluded and he could move on with his life and look for a new position elsewhere.

Snoqualmie Valley Hospital concedes that no one said anything to him about his medical staff privileges when his employment was terminated on February 17, 2011. One hospital official acknowledged that because Dr. Shibley was still within the first year after completion of his residency, he lacked the experience and understanding of the workings of the Medical Staff as an entity, and he was not educated by the Human Resources department or the Medical Executive team about his medical staff privileges when his employment terminated. Had he known at that

time that he could have simply resigned his privileges without further consequence he would have done so. As Dr. Witkop admitted, he was not under investigation at the time his employment was terminated on February 17, 2011² and thus, had he simply resigned his privileges that would have been the end of it.

Instead, a week later on March 8, 2011, individuals at Snoqualmie Valley Hospital, including Dr. Witkop and Dr. Pisani either negligently or intentionally decided to initiate an action against Dr. Shibley's nonexistent privileges. Their subsequent actions have dealt a devastating blow to Dr. Shibley's medical career. On March 8, 2011, over a week after Dr. Shibley believed the matter of his tenure at SVH had been resolved, the MEC voted to terminate privileges it was led to believe Dr. Shibley still had. Shortly afterward, before Dr. Shibley was provided with any notice or a hearing or was even told that the MEC was meeting to discuss the matter of his privileges on March 8, 2011, Snoqualmie Valley Hospital submitted a highly damaging and inaccurate "Adverse Action Report" to the National Practitioner Data Bank on March 14, 2011 falsely accusing him of not examining patient S.T. before he dictated her history and physical. They said they did it because they believed he did not examine

² If a physician resigns medical staff privileges while he or she is "under investigation" the hospital is required to submit a report to the National Practitioner Data Bank which includes the allegations pending against the physician. This is often more damaging to a physician than other actions taken against privileges, because the allegations are usually assumed to be true. In this case, Dr. Witkop admitted that Dr. Shibley was not under investigation after she terminated his employment on February 17, 2011.

patient S.T. before dictating her history and physical report on February 9, 2011, after she was readmitted to the hospital on February 8, 2011, but at the time they had no knowledge whether there were actually any inaccuracies in the H&P report that Dr. Shibley had dictated on February 9, 2011.

The disastrous chain of events initiated by respondents on March 8, 2011 continues to cast doubt on Dr. Shibley's character and competence to this day and has made it extremely difficult for him to find positions commensurate with his education, training and experience. Thus, Dr. Shibley filed this action in March 2013 to establish that he did examine patient S.T and that he did not "falsify records" or "file a false report," and to establish that the actions Snoqualmie Valley Hospital, Dr. Witkop and Dr. Pisani took against privileges he did not have on March 8, 2011 was unwarranted, and to recover damages to his reputation and practice for what they did to him.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by holding that respondents did not violate Dr. Shibley's constitutional right to due process when they met and terminated his alleged medical staff privileges on March 8, 2011 and thereafter published a highly negative and disparaging Adverse Action Report to the National Practitioner Data Bank dated March 14, 2011,

without providing him with any notice or opportunity to be heard before taking the actions.

2. The Superior Court erred by assuming that Dr. Shibley still had provisional medical staff privileges on March 8, 2011 and holding that the MEC's action on that date was essentially a summary suspension of those privileges even though he presented no imminent danger to patient safety on that date and was never afforded any rights physicians whose privileges are actually summarily suspended are entitled to.
3. The Superior Court erred by holding that Snoqualmie Valley Hospital did not violate Dr. Shibley's right to constitutional due process when it submitted a "corrected" Adverse Action Report to the National Practitioner Data Bank on April 12, 2011, claiming that his alleged medical staff privileges had been summarily suspended in excess of 30 days, without providing him with notice or opportunity to be heard within 30 days after the action was supposedly taken.
4. The Superior Court erred when it held that Snoqualmie Valley Hospital did not act fraudulently when it re-characterized the termination of respondent's expired privileges as a "summary suspension" sometime between March 8, 2011 and March 28, 2011, finding that it essentially made no difference whether the hospital terminated or summarily suspended Dr. Shibley's alleged medical staff privileges on March 8, 2011.

5. The Superior Court erred by holding there was no right or process specific to the alleged summary suspension of Dr. Shibley's alleged medical staff privileges that he was not afforded.
6. The Superior Court erred when it held that respondents did not breach the Medical Staff Bylaws.
7. The Superior Court erred by dismissing Dr. Shibley's claim for defamation on the ground that the Adverse Action Reports that Snoqualmie Valley Hospital submitted to the National Practitioner Data Bank dated March 14, 2011 and April 12, 2011 contained a significant amount of accurate information.
8. The Superior Court erred by holding that the immunity provided for in RCW 70.41.210(5) applied to the Adverse Action Reports that Snoqualmie Valley Hospital submitted to the National Practitioner Data Bank dated March 14, 2011 and April 12, 2011.
9. The Superior Court erred by finding that Dr. Shibley contractually waived his right to complain about Snoqualmie Valley Hospital's March 14, 2011 and April 12, 2011 reports to the National Practitioner Data Bank in various documents, including in his original employment contract, the Medical Staff Bylaws and the Severance Agreement.
10. The Superior Court erred by holding that Snoqualmie Valley Hospital did not breach Dr. Shibley's Employment Agreement.

11. The Superior Court erred by failing to determine whether Dr. Witkop's termination of Dr. Shibley's employment constituted retaliation in violation of his right of free speech.
12. The Superior Court erred by entering summary judgment for respondents.

III. STATEMENT OF THE CASE

The grant of summary judgment is reviewed de novo. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 698, 952 P.2d 590 (1998). The court must view all of the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the non-moving party. *Id.* Here, the non-moving party was Dr. Eric Shibley.

The evidence in the light most favorable to Dr. Shibley showed as follows:

Appellant Dr. Eric Shibley is a board-certified internal medicine physician who was hired by respondent Snoqualmie Valley Hospital to begin working as one of its two regular hospitalists beginning September 1, 2010. He emigrated from Bangladesh in 2006. CP 402.

Snoqualmie Valley Hospital recruited Dr. Shibley during the last year of his internal medicine residency at Meharry College in Nashville, Tennessee to begin working after he completed his board certification examination in the summer of 2010. CP 59. He signed an Employment Agreement in March 2010. CP 90. On July 21, 2010 the Governing Board

of the hospital granted Dr. Shibley provisional medical staff privileges to work at the hospital for a period of six months beginning on September 1, 2010. CP 458.

Dr. Shibley was employed by Snoqualmie Valley Hospital for five and a half months between September 1, 2010 until February 17, 2011. CP 134. Snoqualmie Valley Hospital is a governmental entity known as King County Hospital District #4. It is a small, 25-bed facility located in Snoqualmie, Washington. Although licensed as an acute care hospital, most of its patients are “swing bed” patients who are admitted for rehabilitation.

For most of the time Dr. Shibley worked at Snoqualmie Valley Hospital, he worked one week on, one week off, alternating with a senior hospitalist, Dr. Richard Pisani. CP 60. At noon on Wednesday each week, the hospitalist service was transferred from one hospitalist to the other. CP 331. Dr. Shibley was the hospitalist on duty from January 19, 2011 to January 26, 2011 and from February 2, 2011 to February 9, 2011. He was scheduled to resume his duties again on February 16, 2011 at noon and continue working until February 23, 2011. Id.

Patient S.T. was a swing bed patient who was transferred from Overlake Hospital in Bellevue, Washington to Snoqualmie Valley Hospital in January 2011 for rehabilitation. Dr. Shibley cared for her during the week beginning at noon on Wednesday, January 19, 2011 until noon on Wednesday, January 26, 2011. On Tuesday, February 1, 2011,

patient S.T. was transferred to Tacoma General Hospital for removal of an intrathecal pump, a device that delivers pain medication directly to the spinal cord. CP 60.

Patient S.T. remained hospitalized in Tacoma during the next week until she was discharged back to Snoqualmie Valley Hospital during the afternoon on Tuesday, February 8, 2011 to resume her rehabilitation. Patient S.T.'s husband drove them back to Snoqualmie Valley Hospital. By the time they arrived in the late afternoon, Dr. Shibley had gone home for the day.

The next day, Wednesday, February 9, 2011, Dr. Shibley turned over the hospitalist service to Dr. Pisani at noon. CP 60. It was Dr. Shibley's responsibility to examine patient S.T. and dictate a readmission history and physical (H&P) before he left the hospital on February 9, 2011. CP 60. When Dr. Pisani came to the hospital early that morning to prepare for taking over the service, he looked in on patient S.T. and her husband around 8:30 a.m. CP 211. They said he was the first doctor they had seen since they returned to the hospital the previous afternoon. CP 211. Dr. Shibley examined patient S.T. shortly afterward, around 9:30 a.m. that morning and looked in on her again around 1:30 p.m. CP 329. He dictated her H&P around 2 p.m. before going off duty for the next week. CP 329.

Six days later, on Tuesday, February 15, 2011, Dr. Witkop asked Dr. Shibley to come in early the next morning so she could give him his

first six months' performance review. CP 331. Dr. Shibley arrived around 9 a.m. on February 16, 2011 and during the next hour and a half, Dr. Witkop gave him a satisfactory performance review and a Mentoring Plan to work on during the next six months. CP 331. The only category in which Dr. Shibley had not yet met expectations was "Communications." CP 395. After Dr. Shibley left Dr. Witkop's office around 10:30 a.m., he met with Dr. Pisani to begin going over the status of each patient in the hospital before the noon handover time. CP 331. During the meeting, Dr. Shibley and Dr. Pisani became engaged in a heated argument over their respective care of patient R.B., who had been transferred out to Overlake Hospital earlier that morning. CP 331. Dr. Shibley criticized Dr. Pisani's management of patient R.B. and Dr. Pisani criticized Dr. Shibley's fluid management of the patient. CP 332.

After the handover meeting ended around 1:30 p.m., Dr. Pisani said he was standing near the elevator when he suddenly decided to ask Dr. Shibley whether he had examined patient S.T. prior to dictating her H&P the week before on February 9, 2011. CP 371. He claimed he was shocked when Dr. Shibley said he did not examine the patient. *Id.* Dr. Shibley denies that conversation ever took place. CP 332. Shortly afterward, Dr. Shibley and Dr. Witkop met and talked in the hospital stairwell for an hour about some issues they had discussed during his performance review that morning. Dr. Shibley asked her some follow up questions about how she wanted him to do things. Dr. Witkop said that

during this conversation, she spontaneously asked Dr. Shibley whether he had examined patient S.T. on February 9, 2011 and he said that he did not. Dr. Shibley denies this discussion ever took place as well. CP . Dr. Witkop claimed she that she had suspected for several days that Dr. Shibley had not examined patient S.T. before dictating the H&P on February 9, but paradoxically, she never mentioned that to him when she gave him his satisfactory performance review on the morning of February 16, 2011. CP 331. The basis for Dr. Witkop's suspicion that Dr. Shibley had not examined patient S.T. in the morning on February 9, 2011 was that Dr. Pisani had informed her that when he saw patient S.T. on *Thursday*, February 10, 2011, patient S.T. told him he was "the first doctor she had seen" after she came back from Tacoma; thus, Dr. Witkop mistakenly concluded that Dr. Shibley never saw or examined patient S.T. on February 9. CP 869. Dr. Pisani testified that is what patient S.T. said to him around 8:30 a.m. on *Wednesday, February 9*; which is consistent with Dr. Shibley examining her around 9:30 a.m. shortly after that conversation took place. CP 211.

When Dr. Pisani called Dr. Witkop in the evening of February 16, 2011 to let her know he was resigning his hospitalist position following his argument with Dr. Shibley over his treatment of patient R.B., and later emailed he about his thoughts, he did mention Dr. Shibley's alleged failure to examine patient S.T. on the morning of February 9, 2011. CP 868.

After Dr. Pisani informed Dr. Witkop he was resigning because he felt he could no longer work with Dr. Shibley, Dr. Witkop composed some notes in which she weighed the positive and negative aspects of both hospitalists. CP 869-873. The notes reflect that Dr. Pisani's positives outweighed his negatives and that Dr. Shibley's negatives outweighed his positives. CP 872. That evening, she decided to terminate Dr. Shibley's employment the next day.

Around 3:30 p.m. on Thursday, February 17, 2011, one day after she had given Dr. Shibley a favorable performance review, she called Dr. Shibley into her office and terminated his employment effective that afternoon. CP 332. Although her notes contain a list of negatives, she decided to terminate his employment based on her allegation that he had "falsified patient records" by documenting a patient history and physical without having examined the patient. CP 134. Dr. Shibley argued with her for over twenty minutes, repeatedly denying that he had dictated an H&P for patient S.T. without examining her on February 9, but it was to no avail. He was escorted out of the hospital and has not treated any patients at the hospital since that time. He did not protest further because he no longer wanted to work at SVH and was already looking for another position.

Nonetheless, Snoqualmie Valley Hospital offered Dr. Shibley a severance package of one month's pay which he accepted and signed on March 1, 2011. CP 136. The Severance Agreement and Release related

solely to the termination of Dr. Shibley's employment relationship with Snoqualmie Valley Hospital. CP 136. It contained language stating that neither the Severance Agreement nor the consideration exchanged "shall in any way be construed as an admission by any party that it has acted wrongfully," and it also contained a "Non-Disparagement" provision in which the parties agreed "not to disparage one another or make any representations with the intent of damaging the interest of the other" in the future. CP 138. Dr. Shibley further agreed not to apply for employment at the hospital in the future, thereby as a practical matter foreclosing any chance that he would ever return to work at the hospital again. CP 136, 138. Accordingly, Dr. Witkop and Snoqualmie Valley Hospital knew that he had not been involved in any patient care since February 17, 2011 and it was highly unlikely he would ever set foot in the hospital again.

That should have been the end of it. Unfortunately, it was just the beginning of a disastrous chain of events instigated by Dr. Witkop and Snoqualmie Valley Hospital that have seriously damaged Dr. Shibley's reputation and career. A week later, on March 8, 2011, Dr. Witkop attended a meeting of the Medical Executive Committee (MEC) at Snoqualmie Valley Hospital and informed the committee that she had terminated Dr. Shibley's employment effective February 18, 2011. CP CP 874-875. She said that she terminated his employment based on an incident of unprofessional conduct related to an H&P exam that he had documented but not performed. CP 875. She further claimed the incident

was preceded by “three occasions of verbal coaching regarding professionalism in a hospitalist position.” Id. The minutes of the MEC meeting do not reflect that the matter had been investigated or that Dr. Shibley had ‘admitted’ any wrongdoing. Id. Dr. Shibley was not notified of the meeting or of its agenda and he had no knowledge that it was even occurring. CP 333. Thus, he was not given an opportunity to respond to the allegations Dr. Witkop presented to the MEC during the meeting on March 8, 2011.

After some discussion, a motion was made to terminate Dr. Shibley’s clinical privileges citing unprofessional conduct. Dr. Pisani seconded the motion. CP 875. The motion passed, with three yes votes, one no vote and one abstention. CP 875. Because Dr. Shibley knew nothing about the meeting or its agenda, he had no opportunity to point out to the committee that his provisional privileges had expired over a week earlier and thus he had no privileges for the MEC to act upon. The MEC minutes noted, “This is a reportable action to both the NPDB [National Practitioner Data Bank] and the Washington State licensing board.” CP 875.

On March 15, 2011, Snoqualmie Valley Hospital submitted an Adverse Action Report to the National Practitioner Data Bank dated March 14, 2011 that described the MEC’s action as a “*Revocation of Clinical Privileges*” based on “*Filing False Reports or Falsifying Records*” “...on grounds of one act of unprofessional conduct exhibited

as documentation of conducting a patient history and physical *without having examined the patient.*” (emphasis added) CP 883-834. CEO Rodger McCollum confirmed the action in a letter to Dr. Shibley dated March 14, 2011 informing him that the MEC had terminated his privileges effective March 8, 2011 citing unprofessional conduct, and that the action was being reported to the NPDB and Washington state licensing board. CP 882.

Dr. Shibley’s attorney immediately notified the hospital that it could not take any action against privileges without due process and demanded that the MEC’s action be withdrawn. CP 888-889. Because the March 14, 2011 Adverse Action Report was negative and disparaging, Dr. Shibley also rescinded the Severance Agreement and Release. CP 889. On March 18, 2011, the hospital’s general counsel acknowledged Dr. Shibley’s request for a hearing regarding the “termination” of his privileges and his decision to rescind the Severance Agreement and Release. CP 890-891. However, instead of acknowledging that the process and action taken on March 8, 2011 was legally invalid, the hospital’s general counsel began to perpetrate a fraud on Dr. Shibley by taking it upon himself to recharacterize the MEC action on March 8, 2011 as a “summary suspension” and he tried to cover up the invalidity of the action on March 8, 2011 by submitting a second false Adverse Action Report to the NPDB on April 12, 2011 when in fact Dr. Shibley had no privileges on March 8, 2011 and the MEC did not summarily suspend any

physician's privileges on that date. CP 900-901. The "corrected" report that he submitted to the NPDB on April 12, 2011 re-characterized the hospital's action on March 8, 2011 as a summary suspension of Dr. Shibley's unspecified privileges and reported that "Physician's employment was terminated and subsequently his privileges were summarily suspended for a period in excess of 30 days on grounds of one act of unprofessional conduct exhibited as documentation of conducting a patient history and physical without having examined the patient," CP 901 thereby taking the position that the hospital had only "summarily suspended" Dr. Shibley's privileges on March 8 when in fact that never actually happened. When the 30 days began or expired has never been specified by the hospital. The first time the term "summary suspension" ever appeared was when the hospital's general counsel innocuously slipped it into the second page of a letter that he sent to Dr. Shibley's counsel on March 28, 2011, long after the MEC meeting on March 28, 2011. CP 892-893.

There is no evidence that the MEC ever "summarily suspended" Dr. Shibley's privileges on March 8, 2011. No contemporaneous documents support this position. The second Adverse Action Report that Snoqualmie Valley Hospital submitted to the NPDB on April 12, 2011 cannot be reconciled with the procedural provisions contained in the Medical Staff Bylaws Article 7, Section 2 regarding rights attendant to summary suspension of a physician's privileges. CP 289. The minutes of

the MEC meeting on March 8, 2011 indicate the MEC *terminated* Dr. Shibley's privileges. CP 875. The MEC never met after March 8, 2011 to consider Dr. Shibley's privileges again. Dr. Shibley was never notified that his privileges were "summarily suspended" on March 8, 2011 and he was never afforded any of the rights provided for in the Medical Staff Bylaws for physicians whose privileges have been summarily suspended. CP 333.

It is undisputed that prior to the MEC's termination of Dr. Shibley's privileges on March 8, 2011 and the hospital's publication of the Adverse Action Report to the NPDB dated March 14, 2011, neither the hospital nor the MEC provided Dr. Shibley with any notice or an opportunity to be heard regarding these highly negative and disparaging allegations. Nor did they ever explain to Dr. Shibley or inform him any of the notice or hearing rights that are specified in the Medical Staff Bylaws regarding physicians whose privileges are summarily suspended. These actions violated constitutional due process, fair procedure and certain express terms contained in the hospital's Medical Staff Bylaws that both parties agreed to be bound by. The effect of these serious procedural deprivations, which Dr. Shibley contends amounted to a fraud perpetrated on him by the respondents, tainted and vitiated all the events that came afterward.

No one said anything to Dr. Shibley about his medical staff privileges when his employment was terminated on February 17, 2011, or

at any time before he signed the Severance Agreement on March 1, 2011. CP 887. Ms. Barbara Donovan, Director of Medical Staff Services at the hospital acknowledged that because Dr. Shibley was still within the first year after completion of his residency, he lacked the experience and understanding of the workings of the Medical Staff as an entity, and he was not educated by the hospital's Human Resources department or the Medical Executive team about his medical staff privileges when Snoqualmie Valley Hospital terminated his employment on February 17, 2011. Id. According to the letter that the Chief of Staff sent him on July 21, 2010, his appointment to the provisional medical staff lasted for only six months from his start date CP 458 (which began on September 1, 2010), and according to Section 4.a of the Medical Staff Bylaws, his provisional medical staff privileges "conclusively terminated" six months later because he was not advanced to either the active or courtesy staff; thus, he did not have any privileges as of March 1, 2011. CP 453.

It is further undisputed that neither Dr. Witkop nor anyone else at the hospital undertook any investigation of the matter before his employment was terminated on February 17, 2011. CP 381-383. At that time no one at the hospital even knew whether there were in fact any inaccuracies in the H&P report. CP 383. It did not matter because Dr. Witkop had made up her mind to terminate Dr. Shibley within hours of speaking with Dr. Pisani about his intention to resign in the

evening on February 16 because of disagreements between him and Dr. Shibley regarding the clinical care of patients at the hospital.

None of Dr. Shibley's subsequent efforts to remove the permanent stain on his record and his professional reputation created by these events were successful. The MEC defended its actions in a peer review hearing conducted in May and June 2011 before a hearing committee of three physicians and hearing officer handpicked by the hospital; during the hearing, witnesses for the hospital admitted they conducted no investigation into the allegations made against him and did not know whether in fact there were any inaccuracies in patient S.T.'s H&P when Dr. Witkop fired him on February 17, 2011. CP 375-376; CP 381-383. The members of the governing board were unavoidably biased by their knowledge that any decision in Dr. Shibley's favor would likely expose the hospital to a claim for damages; thus, they denied his appeal.

Despite the fact that the only witnesses present in the patient's room on February 9, 2011 when Dr. Shibley examined patient S.T.—Dr. Shibley, patient S.T., and her husband—all confirmed that he examined the patient before dictating the H&P that afternoon, CP 329; CP 348-354, the hearing committee adopted the story told by Dr. Witkop, Dr. Pisani and the hospital's new Human Resources manager that Dr. Shibley “admitted” to them that he did not examine the patient, an accusation that Dr. Shibley has continuously denied to this day. Accordingly, the hearing committee and the hospital's governing body upheld the action taken by

the MEC on March 8, 2011, whatever it was. CP 170-172. Thereafter, the Washington Medical Quality Assurance Commission (WMQAC) accused Dr. Shibley of unprofessional conduct based on the fact that some of the vital signs contained in patient S.T.'s H&P were inaccurate. CP 911-916. Dr. Shibley admitted in an Agreed Order that the vital signs taken by the nurses that he transferred from a computer screen were inaccurate but the Medical Quality Commission did not find that he "falsified a record." CP 911-916. Dr. Shibley was required to take a record keeping course, an ethics course and his license was placed on probation. WMQAC terminated Dr. Shibley's probation early after one year. Id.

In March 2013, Dr. Shibley filed a lawsuit against Snoqualmie Valley Hospital, Dr. Witkop and Dr. Pisani alleging ten causes of action, including violation of due process, breach of the Medical Bylaws contract and defamation. CP 1-33. After discovery, on November 20, 2014, Roger Rogoff, Judge of the Superior Court of King County, granted respondents motion for summary judgment on all claims. CP 568-583. On December 17, 2014, Judge Rogoff denied respondents' motion for attorneys' fees and costs, finding among other things that Dr. Shibley's lawsuit was not frivolous because it involved significant claims and factual disputes that he ultimately determined could not survive summary judgment. CP 855-858. That same day, Dr. Shibley filed a Notice of Appeal. On December 24, 2014, Respondents cross appealed the court's denial of their motion for attorneys' fees and costs. A transcript of the oral argument

proceedings on November 14, 2014 regarding defendants' motion for summary judgment was filed in this court on February 6, 2015.

IV. ARGUMENT

- A. Respondents violated Dr. Shibley's constitutional right to procedural due process when they voted to terminate his purported provisional medical staff privileges on March 8, 2011 without any notice or hearing.

The Due Process Clause of the Fourteenth Amendment provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

Respondent King County Hospital District #4 d/b/a Snoqualmie Valley Hospital is a government hospital, created pursuant to RCW 70.44 and as such its actions constitute "state action" subject to the 14th Amendment's due process clause. Appellant Dr. Eric Shibley is a physician licensed in Washington who has liberty interest in his professional reputation protected by the 14th Amendment.³ See *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972), *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name,

³ Most states hold that a physician also has a protected property interest in his or her medical staff privileges. See, e.g., *Northeast Georgia Radiological Associates v. Tidwell*, 670 F.2d 507 (1982); However, the old case of *Ritter v. Board of Commissioners of Adams County Public Hospital District No. 1*, 96 Wn.2d 503, 637 P.2d 940 (1981) held that a physician in Washington did not have a property interest in his medical staff privileges. The *Ritter* case was decided five years before Congress passed the Health Care Quality Improvement Act of 1986 (HCQIA), 42 USC §11101 et seq., which became effective in Washington in July 1986, RCW 7.71.020. HCQIA created the National Practitioner Data Bank (NPDB) beginning September 1, 1990. Because an adverse privileging action that is reported to the NPDB can have a devastating impact on a physician's reputation and ability to find another position, it is doubtful that the *Ritter* case would be decided the same way in 2015.

reputation, honor, or integrity are at stake, because of what the government is doing to him, notice and an opportunity to be heard are essential.”) Here, Snoqualmie Valley Hospital deprived Dr. Shibley of his liberty interest in his reputation without any due process of law by terminating his purported medical staff privileges on March 8, 2011 and submitting a highly damaging Adverse Action Report which accused him of “Filing False Reports or Falsifying Records” and describing the action taken as “Physician employment was terminated and subsequently his privileges were terminated on grounds of one act of unprofessional conduct exhibited as documentation of conducting a patient history and physical without having examined the patient” CP 883-884 before he even knew that the hospital was trying to do anything to privileges that he did not believe he even had. CP 332-333.

As Justice Powell wrote in *Carey v. Piphus*, 435 U.S. 247 (1978): “Because the right to procedural due process is ‘absolute’ in the sense that it does not depend on the merits of a claimant’s substantive assertions, and because of the importance to organized society that procedural due process be observed, the denial of procedural due process should be actionable for nominal damages without proof of actual injury, and therefore if it is determined that the [actions] were justified, the [claimant] will be entitled to claim nominal damages. 435 U.S. at 266-67. Thus, at a minimum, the Superior Court erred when it granted summary judgment to defendants on appellant’s due process claim.

- B. Appellant did not have any privileges to practice medicine at Snoqualmie Valley Hospital on March 8, 2011 because his provisional privileges conclusively terminated on February 28, 2011.

The Superior Court committed error when it found that the six-month provisional period related only to Dr. Shibley's "membership" on the medical staff and not to his provisional privileges, and that no section in the Medical Staff Bylaws indicated that the initial six-month provisional privileges automatically terminated upon the conclusion of the practitioner's six-month medical staff appointment. Section 4.a of the Medical Staff Bylaws specifically provides that provisional privileges "conclusively terminate" six months after the original grant of provisional privileges if the physician is not advanced to the active or courtesy staffs and does not apply for renewal of the provisional privileges:

Section 4. The Provisional Medical Staff

- a. All initial appointments to the Medical Staff shall be to the provisional Medical Staff for a period of six (6) months. At the conclusion of six months, the Medical Staff will: (i) recommend the Practitioner be appointed to the active or courtesy Medical Staff according to his or her original application; (ii) be reappointed to the provisional staff for an additional period not exceeding 18 months allowing additional observation; or, (iii) be removed from the Medical Staff....Upon *expiration* of a Practitioner's appointment to the provisional staff, the failure to transfer the Practitioner from provisional to Active or Courtesy Staff Membership *shall be conclusively deemed to be a termination of his staff appointment.* (emphasis added) CP 277.

In its Order on Motion for Summary Judgment, the Court completely overlooked this critical provision in the Medical Staff Bylaws.

Here, Dr. Shibley's initial appointment lasted for only six months from his start date. CP 861. The hospital admits that his start date was not later than September 1, 2010, that he was never advanced to the Active Medical Staff or the Courtesy Medical Staff and that he was never reappointed to the provisional Medical Staff. CP 321. Thus, Dr. Shibley's provisional privileges "conclusively terminated" on February 28, 2011, six months after he was originally granted provisional privileges because he was not advanced to the Active or Courtesy Medical Staff and he did not apply for renewal of his provisional privileges. CP 277. Accordingly, Dr. Shibley had no medical staff privileges after February 28, 2011. CP 277.

Not only was the action on March 8, 2011 invalid because Dr. Shibley had no privileges for the MEC to take action against, it was also invalid because the MEC had no authority to terminate Dr. Shibley's privileges. The hospital used the code "Revocation of clinical privileges" in the Adverse Action Report it submitted to the NPDB on March 14, 2011. CP 883-884. The hospital's subsequent submission of a "correction" to the NPDB on April 12, 2011 changing the MEC's action March 8, 2011 from a "termination" of Dr. Shibley's privileges to a "summary suspension" of his privileges constitutes an admission that the MEC did not have the authority to terminate his privileges and that no privileges were in fact terminated on that date. The actions that respondents took against 'privileges' that Dr. Shibley did not have after March 1, 2011 were not only unnecessary and uncalled for, they seriously

damaged Dr. Shibley's professional reputation and future career opportunities, especially by accusing him of filing "false reports" and not examining patient S.T.

C. The Court erred by holding that respondents "summarily suspended" Dr. Shibley's purported provisional staff privileges on March 8, 2011 and that there was no right or process specific to a summary suspension that Dr. Shibley was not afforded.

In a letter to Dr. Shibley's attorney dated March 18, 2011, Snoqualmie Valley Hospital's general counsel used the term "summary suspension" for the first time to describe the action taken by the MEC on March 8, 2011. CP 892-893. There is no evidence that the MEC "summarily suspended" Dr. Shibley's privileges on March 8, 2011 and no contemporaneous documents support that changed of position. Dr. Shibley was never notified that his privileges were "summarily suspended" on March 8, 2011 and the minutes of the MEC meeting on March 8 plainly state that the MEC terminated privileges it assumed he had on that date. CP 874-875. There is no mention of any "summary suspension" anywhere before Mr. Rodne's letter of March 18, 2011. CP 890-891.

Furthermore, Dr. Shibley was never afforded any of the rights provided for in the Medical Staff Bylaws for physicians whose privileges have been summarily suspended. Article 7, Section 2.a of the Bylaws authorizes the MEC to summarily suspend the privileges of any

Practitioner but only “whenever action must be taken immediately in the best interest of patient care in the Hospital.” CP 289. Here, the MEC would not have had any valid justification for imposing a summary suspension of Dr. Shibley’s privileges because he was not currently treating any patients in the hospital, had not worked in the hospital for almost three weeks and had further promised not to seek employment there again in the future. CP 136. Compare, *Smigaj v. Yakima Valley Memorial Hospital*, 165 Wn.App. 837, 269 P.3d 323 (2012) in which Division III of the Court of Appeals held that a summary suspension of a doctor’s privileges was invalid because she did not pose any threat of “imminent danger” to patients. 269 P.3d at 335.

Article 7, Section 2.a provides that “A written report describing the particular circumstances resulting in such summary suspension...shall be given by Special Notice to the affected Practitioner...” Dr. Shibley never received a written report by Special Notice describing the particular circumstances resulting in a so-called ‘summary suspension’ of his purported privileges.

Furthermore, Article 7, Section 1.c provides that “If the corrective action could result in a reduction or suspension of Clinical Privileges, or a termination of Medical Staff Membership, the affected Practitioner shall be permitted to make an appearance before the Medical Executive Committee prior to its taking action.” Here, the MEC took action against Dr. Shibley’s purported privileges without notifying him that it was even

considering taking such an action, much less say inviting him to make an appearance before the MEC before it acted. Article 7, Section 2.b of the Bylaws also provides that “A practitioner whose Clinical Privileges have been summarily suspended shall be entitled to request promptly in writing that the Medical Executive Committee consider the matter at its next regular meeting or within such reasonable time as the Medical Executive Committee may be convened.” CP 191. This section assumes the practitioner has received timely notice of the “summary suspension” of privileges (which normally means *immediate* notice so the practitioner does not continue to treat patients until the matter is resolved). Dr. Shibley did not request a meeting with the MEC to consider the matter at its next meeting because he did not receive the requisite notice in time to make any difference; by April 12, 2011, the hospital had already taken the position that the thirty day period to report the so-called summary suspension had already passed so it went ahead and submitted two damaging reports to the Data Bank. The whole purpose of Section Article 7, Section 2.b. is to give the affected practitioner an opportunity to meet with the MEC and explain the conduct in question in order to persuade the committee to terminate the summary suspension *before* the thirty day period runs so that there is NO report to the Data Bank. Here, Dr. Shibley Snoqualmie Valley Hospital never even notified Dr. Shibley of when the so-called summary suspension began or when the 30-day period ended. By the time the phrase “summary suspension” finally began to appear, the

parties were preparing for a hearing; the meeting with the MEC is supposed to occur *before* a summary suspension is imposed or not longer than shortly after that before a request for a hearing is made and if the suspension is not lifted at that time, then the practitioner has 30 days to request a hearing. In this case, the events that were supposed to take place either never took place or are completely out of order. The process related to summary suspensions spelled out in the Medical Staff Bylaws was never followed which is further evidence that the MEC never in fact summarily suspend Dr. Shibley's privileges and it also explains why he was never notified of any of his rights attendant to such action because it never actually occurred. If Dr. Shibley had been informed within a day or two of March 8, 2011 that his privileges were about to be summarily suspended, he could have requested a meeting with the MEC which he a right to⁴ and persuaded the committee that a summary suspension was completely inappropriate because (1) he did not have any privileges at that time and (2) nor did he present a threat to patient safety. However, he was deprived of that right because the hospital finessed his opportunity to make his case to the MEC when the exercise of that right might well have obviated any further action being taken against him.

⁴ Bylaws Article 7, Section 1.c provides that "If the corrective action could result in...a termination of Medical Staff membership, the affected Practitioner shall be permitted to make an appearance before the Medical Executive Committee prior to its taking action." CP 288. In Dr. Shibley's case, he was completely unaware of the fact that the MEC was even meeting on March 8, 2011 or would be considering taking action regarding privileges that he did not even have. CP 333.

Finally, Article 7, Section 2.c provides that after duly considering the matter, the Medical Executive Committee may modify, continue or terminate the summary suspension. Here, the irregular process that the MEC and hospital followed when they initiated actions against Dr. Shibley deprived him of his opportunity to present a compelling case that what they were doing was unnecessary, unauthorized and probably illegal. Furthermore, the MEC either knew or should have known that Dr. Shibley's circumstances on March 8, 2011 came nowhere near satisfying the standards for imposing a summary suspension of any doctor's privileges. See *Smigaj*, supra. The MEC probably was aware of the proper standard but was never consulted about it; the reason the action came to be characterized as a "summary suspension" was purely because the hospital's general counsel decided that it was the best way to try to cover up the mistake that the hospital made in the first place when it reported that it terminated Dr. Shibley's privileges before affording him any notice or hearing.

D. The Court erred when it held that Snoqualmie Valley Hospital's action were valid and that it did not act fraudulently when it submitted a corrected Adverse Action Report to the National Practitioner Data Bank on April 12, 2011 that re-characterized the action taken by the Medical Executive Committee on March 8, 2011 as a "summary suspension" of Dr. Shibley's purported provisional privileges without the approval of the MEC.

In an active cover up, deception is used to try to conceal evidence of an error or incompetence. Here, the hospital's general counsel

attempted to cover up the error the MEC made on March 8, 2011 by re-characterizing the termination of Dr. Shibley's assumed privileges as a "summary suspension" of such privileges. The Court excused this deceptive maneuver by finding that "The cessation of Dr. Shibley's privileges was, in every way other than the term assigned to it, a summary suspension rather than a termination." The Court's finding is clearly erroneous because it deprived Dr. Shibley of fundamental contractual and constitutional procedural rights that could have obviated the action and everything that came after it.

Because the MEC mistakenly assumed Dr. Shibley still had privileges on March 8, 2011, and because its decision to terminate privileges was invalid because it lacked any authority to terminate privileges, and because no privileges were in fact summarily suspended, the entire process was invalid. Because the MEC's attempt to terminate Dr. Shibley's privileges on March 8, 2011 was invalid and his privileges were in fact never summarily suspended, to this day no valid action has ever been taken by Snoqualmie Valley Hospital against Dr. Shibley's privileges if in fact he ever had privileges on that date. For this reason alone, this Court must reverse the summary judgment in favor of respondents in this case.

By falsely claiming that the MEC "summarily suspended" Dr. Shibley's privileges on March 8, 2011, Snoqualmie Valley Hospital perpetrated a fraud on him. It presented him with the Hobson's choice of

going forward with a hearing before individuals who had an interest in seeing that he did not prevail, and “waiving” his right to a hearing and having the hospital submit a damaging report to the National Practitioner Data Bank claiming he had not challenged its accusation that he dictated an H&P without examining the patient. At that point, there was no way out. Fraud occurs when a person who makes a false statement, knows it is false and intends to deceive the alleged victim who justifiably relies on the statement and is injured as a result. *Kritzer v. Moffat*, 136 Wash. 410 (1925)

The law governing fraudulent acts is that “fraud vitiates everything which it touches.” *Coson v. Roehl*, 63 Wn.2d 384, 387 P.2d 541 (1963). The *Coson* court relied on the “classic case of *Angerosa v. White Co.*, 248 App. Div. 425, 290 N.Y.S. 204 (1936),” in holding that to deny relief to the victim of a deliberate fraud because of his own negligence would encourage falsehood and dishonesty. “In this jurisdiction protection is given to one who is injured by falsehood or deception; fraud vitiates everything which it touches, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity. A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper and it makes no difference whether the fraud goes to the factum or whether it is preliminary to the execution of the agreement itself. *Coson*, at 388, quoting *Angerosa v. White Co.*, supra.

Dr. Shibley had no choice except to rely on what the hospital's attorney said to his attorney about the "summary suspension" and proceed to a hearing which he never should have had to do, but if he had failed to request or attend a hearing, the hospital would have claimed that he waived his right to protest the MEC's action, whatever it was, and would have submitted a negative Adverse Action Report sealing in stone its allegations against Dr. Shibley.

Respondents' fraudulent conduct, the creation of a second false NPDB report⁵ and changing the MEC vote from "termination" to "summary suspension" without its approval, vitiated all the events that came afterward, including the release he signed on March 1, 2011. It also negated respondents' purported immunity under the Health Care Quality Improvement Act, 42 U.S.C. Section 11101 et seq. which only shields conduct made "without knowledge of the falsity of the information in the report." *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1134 (10th Cir. N.M. 1996). The hospital knew or should have known that the MEC never had any authority to terminate any physician's privileges and it certainly knew that the MEC did not in fact at any time "summarily suspend" Dr. Shibley's privileges. Thus, respondents acted fraudulently

⁵ The first NPDB report (March 14, 2011) was false because Snoqualmie Valley Hospital admitted it did not terminate Dr. Shibley's privileges on March 8, 2011 and it was materially misleading because it implied that there had been a finding before an impartial panel that he had falsified an H&P without examining the patient. The second NPDB report (April 12, 2011) was false because Dr. Shibley's so-called privileges were never "summarily suspended" and it was materially misleading for the same reason above.

when the hospital claimed it “summarily suspended” Dr. Shibley’s nonexistent privileges, which in fact were never summarily suspended. Furthermore, no valid action has ever been taken by Snoqualmie Valley Hospital against Dr. Shibley’s privileges and all of the actions that ensued have been vitiated by respondents’ fraudulent conduct.

E. The Court erred when it held that respondents did not breach contractual provisions in the Medical Staff Bylaws or Dr. Shibley’s Employment Agreement.

A majority of the states that have considered the issue whether Medical Staff Bylaws constitute a contract between a physician and the hospital have held that they are either a contract or are contractual in nature, such that each party is bound by the terms contained in the Bylaws, which, as in this case, are almost universally approved by the governing Board of the hospital.⁶ Most recently, the Supreme Court of Minnesota

⁶ *States where medical staff bylaws are a contract*: Alabama, see *Clemons v. Fairview Medical Center*, 449 So. 2d 788, 790 (Ala. 1984); Alaska, see *Eidelson v. Archer*, 645P.2d 171, 178 (Alaska 1982); Arizona, see *Samaritan Health System v. Superior Court*, 981 P.2d 584, 588 (Ariz. Ct. App. 1998); District of Columbia, see *Balkissoon v. Capitol Hill Hospital*, 558 A.2d 304, 308 (D.C. Cir 1989); Florida, see *Greenburg v. Mt. Sinai Medical Center*, 629 So. 2d 252, 257(Fla. Dist. Ct. App. 1993); Illinois, see *Pariser v. Christian Health System*, 816 F.2d 1248, 1251 (8th Cir. 1987); *Garibaldi v. Applebaum*, 653 N.E. 2d 42, 45 (Ill. App. Ct. 1995); Indiana, see *People v. Parkview Memorial Hospital* 536 N.E.2d 274, 276 (Ind. 1989); Iowa, see *Islami v. Covenant Medical Center*, 822 F. Supp. 1361, 1370-71 (N.D. Iowa 1992); Louisiana, see *Granger v. Christus Health Central Louisiana*, 97 So.3d 604 (La. 2012); Maine, see *Bartley v. Eastern Maine Medical Center*, 617 A.2d1020, 1021 (Me. 1992); Maryland, see *Anne Arundel General Hospital v. O’Brien*, 432 A.2d 483, 488 (Md. Ct. Spec. App. 1981); Minnesota, see *Medical Staff of Avera Medical Center v. Avera Marshall d/b/a Avera Marshall Regional Medical Center*, 857 N.W.2d 695 (Minn. 2014); Nebraska, see *Babcock v. St. Francis Medical Center*, 543 N.W.2d 749, 760 (Neb. Ct. App. 1996); New Jersey, see *Joseph v. Passaic Hospital Ass’n*, 118 A2d 696, 700 (N.J. Super. Ct. App. Div. 1955); New

held in *Medical Staff of Avera Regional Medical Center v. Avera Marshall d/b/a Avera Regional Medical Center*, 857 N.W.2d 695 (Minn. 2014) that medical staff bylaws are an enforceable contract. No Washington case has decided this issue, but in this case the Superior Court presumed that the Bylaws constituted a contract between Dr. Shibley and the hospital. CP 576. However, the Court erred when it found that Dr. Shibley's provisional medical staff privileges did not automatically terminate at the end of the six-month provisional period because it failed to take into account the determinative language in Bylaws Article 4, Section 4.a that expressly provides that provisional privileges "conclusively terminate" after six months if the physician is not advanced to the active or courtesy staff. Because Dr. Shibley was originally granted privileges on September

Mexico, see *Clough v. Adventist Health System*, 780 P.2d 627, 632 (N.M. 1989); New York, see *Falk v. Anesthesia Associates of Jamaica*, 644 N.Y.S. 2d 237, 239-40 (N.Y. App. Div. 1996); North Carolina, see *Virmani v. Presbyterian Health Services Corp.*, 488 S.E.2d 284, 287-88 (N.C. Ct. App. 1997); Pennsylvania, see *Posner v. Lankenau Hospital*, 645 F. Supp. 1102, 1106 (E.D. Pa. 1986); South Dakota, see *St. John's Hospital Medical Staff v. St. John's Regional Medical Center*, 245 N.W.2d 472, 474 (S.D. 1976); Tennessee, see *Lewisburg Community Hospital v. Alfredson*, 805 S.W. 756, 759 (Tenn. 1991); Texas, see *East Texas Medical Center Cancer Institute v. Anderson*, 991 S.W.2d 55, 62-63 (Tex. Ct. App. 1998); Utah, see *Brinton v. IHC Hospitals*, 973 P.2d 956, 966 (Utah 1998); West Virginia, see *Mahmoodian v. United Hospital Center*, 404 S.E.2d 750, 755 (W.Va. 1991); Wisconsin, see *Bass v. Ambrosius*, 520 N.W. 2d 625, 627-29 (Wisc. Ct. App. 1994). See also the following states that have assumed contractual obligations: Colorado, see *Even v. Longmont United Hospital Ass'n*, 629 P.2d 1 100, 1103 (Colo. Ct. App. 1981); Massachusetts, see *Dub v. Jordan Hospital*, 341 N.E.2d 876, 879 (Mass. 1976); Mississippi, see *Wong v. Stripling*, 700 So. 2d 296, 300-02 (Miss. 1997); Ohio, see *Bouquett v. St. Elizabeth Corp.*, 538 N.E.2d 113, 115-16 (Ohio 1989); Oklahoma, see *Ponca City Hospital v. Murphree*, 545 P.2d 738, 742 (Okla. 1976); Virginia, see *Medical Center Hospitals v. Terzis*, 367 S.E.2d 728, 729 (Va. 1988); and Connecticut, see *Gianetti v. Norwalk Hospital*, 557 A.2d 1249, 1252-55 (Conn. 1989); *Owens v. New Britain General Hospital*, 643 A.2d 233, 235, n.25 (Conn. 1994) (medical staff bylaws are enforceable in the entire context of the relationship between the physicians and the hospital.)

1, 2010, and because he was not advanced to the active or courtesy staff and he was not reappointed to the provisional staff after the original six month period expired, he had no privileges after February 28, 2011. Thus, respondents breached the explicit, unambiguous provisions contained in Medical Staff Bylaws Section 4.a when they claimed his provisional privileges continued beyond February 28, 2011.⁷ The Court also erred when it failed to hold that respondents violated numerous other provisions in the Medical Staff Bylaws when they did not provide him with any of the procedural protections afforded to physicians in Article 7, Section 1.c (“the practitioner *shall* be permitted to make an appearance before the Medical Executive Committee prior to its taking action”) and Article 7, Section 2.a-c related to summary suspension of privileges—if that actually occurred at all. Finally, respondents even breached Section 5.d of Dr. Shibley’s employment contract when they failed to give him an opportunity to cure the alleged breach his agreement after they accused him of dictating an H&P without seeing patient S.T. The Severance Agreement and Release recited that “Employee’s employment and Employment Agreement for Physician Services are terminated February 17, 2011, by the District for cause under provision 5.1, Immediate Termination by District for Cause, section (d) as related to issues under

⁷ The Court erred when it confused the time periods referred for “actions” as “advisory only and not mandatory” because Dr. Shibley’s provisional privileges expired *automatically* on February 28, 2011 pursuant to the “conclusively terminated” language in Bylaws Section 4.a; no “action” was taken or required to be taken regarding the *expiration* of his privileges on that date.

section 3.8, Records and Files.” Section 5.1(d) in Dr. Shibley’s employment agreement provided that District may terminate this Agreement immediately upon written notice to Physician if any of the following occur: (d) Physician fails to comply with any term of this Agreement...after *notice and a reasonable opportunity to cure.*” (emphasis added) CP 93. If Dr. Shibley had been given an opportunity to cure after he was accused of “falsifying patient records” he could have gone back at that time, reviewed patient S.T.’s H&P report and corrected any inaccuracies. Dr. Witkop and the hospital breached Dr. Shibley’s employment agreement when they failed to give him an opportunity to cure the alleged deficiency in patient S.T.’s H&P.

F. The Court erred by dismissing Dr. Shibley’s claim for defamation.

Dr. Shibley contends that respondents defamed him when they claimed that he “falsified a record” by documenting “a patient history and physical without having examined the patient” and published those allegations to the entire healthcare world via the National Practitioner Data Bank reports they submitted on March 14, 2011 and again on April 12, 2011, which gave access to all hospitals, employers, insurers and payors of the false information contained in those reports, particularly after they had agreed in the Severance Agreement and Release dated March 1, 2011 not to disparage one another or make any representations with the intent of damaging the interest of the other. CP 138. The Court erred when it

noted (without providing any specifics) that “the NPDB report contained a significant amount of information that Plaintiff does not dispute was accurate” CP 581, because Dr. Shibley has consistently said he examined patient S.T. in the morning on February 9, 2011, and he has consistently denied that he “falsified” her H&P. Because there is a material issue of fact whether Dr. Shibley examined patient S.T. or whether he “falsified” patient S.T.’s H&P rather than simply making an inconsequential mistakes when he dictated her vital signs, the Court erred by granting summary judgment in favor of respondents on his defamation claim.

G. The Court erred by finding that Snoqualmie Valley Hospital was immune from liability for submitting Adverse Action Reports to the National Practitioner Data Bank dated March 14, 2011 and April 12, 2011.

Because Snoqualmie Valley Hospital did not afford Dr. Shibley any notice or hearing procedures required by the Health Care Quality Improvement Act of 1986 (HCQIA) in 42 U.S.C. Section 11112(a)(3) before submitting false reports to the National Practitioner Data Bank, it is not immune from liability for injunctive relief or damages. Snoqualmie Valley Hospital is also not immune because it failed to make a reasonable effort to obtain the facts of the matter and did not investigate whether the H&P that Dr. Shibley dictated for patient S.T. on February 9, 2011 was in fact “false” or investigate whether Dr. Shibley had in fact examined patient S.T. that morning. See 42 U.S.C Section 11112(a)(2) and CP 381-

383 and CP 375-376. The third reason there is no HCQIA immunity is that there was no “emergency” of any kind on March 8, 2011 (Dr. Shibley left the hospital over two weeks earlier and had agreed not to return again) and Snoqualmie Valley Hospital did not conduct any investigation during the next 14 days to determine the need for a professional review action. See 42 U.S.C. Section 11112(c)(1)(B) and Section 11112(c)(2). In fact, Dr. Witkop confirmed that no action was in progress or pending as of February 17, 2011 when Dr. Shibley left the hospital after she terminated his employment. CP 908. The fourth reason there is no immunity is that Snoqualmie Valley Hospital failed to investigate whether any of the information in patient S.T.’s H&P was false. It failed to interview patient S.T. or her husband during the 14 days before or after February 17, 2011 or during the 14 days after March 8, 2011. See *Smigaj v. Yakima Valley Memorial Hospital*, 165 Wash.App. 837, 269 P.3d 323 (2012). The fifth reason that the Court erred when it found that the hospital was immune from liability is because HCQIA does not provide immunity from injunctive relief. The Court also erred when it held that RCW 70.41.210(5) provided immunity and protected the hospital from liability for filing the reports it submitted to the NPDB because RCW 70.41.210(5) applies only to reports submitted to the Washington Department of Health and does not apply to reports submitted to the NPDB. Snoqualmie Valley Hospital is also not immune from liability because its general counsel who created the false reports that were submitted to the NPDB is not a member

of the MEC and he was not involved in the peer review process. In fact, he usurped the MEC when he re-characterized the MEC action on March 8, 2011 from a termination of Dr. Shibley's presumed privileges to a "summary suspension" without having any authority to do so.

Finally, in *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1134 (10th Cir. N.M. 1996) the 10th Circuit Court denied immunity to an individual doctor under HCQIA based on the failure to conduct a reasonable investigation and making a false report under 42 U.S.C. Section 11137(c). Similarly, immunity was not granted in *Osuagwu v. Gila Regional Medical Center*, 850 F. Supp. 2d 1216 (D.N.M. 2012) when the trial court found that the hospital violated its own bylaws,⁸ failed to provide Dr. Osuagwa with due process, and a doctor submitted an erroneous report to the NPDB. Accordingly, the Superior Court erred when it held that Snoqualmie Valley Hospital was immune from liability when it submitted Adverse Action Reports to the NPDB on March 14, 2011 and April 12, 2011.

H. The Court erred by holding that Dr. Shibley contractually waived his right to complain about the Adverse Action Reports that respondent hospital submitted to the National Practitioner Data Bank on March 14, 2011 and April 12, 2011.

The Court erred when it found that Dr. Shibley waived his right to complain about the reports that Snoqualmie Valley Hospital submitted to

⁸ See also, *Balkissoon v. Capitol Hill Hospital*, 558 A.2d 304 (D.C. Cir. 1989) which held that a hospital's failure to comply with procedures in its bylaws is inherently arbitrary.

the NPDB “in various contracts, including his original employment contract, the Medical Staff Bylaws and the severance agreement.” CP 582. Dr. Shibley’s Employment Agreement for Physician Services dated March 30, 2010 does not contain any waiver provision at all much less say language waiving his right to complain about reports submitted to the NPDB. CP 90-99. Nor does the Severance Agreement and Release that the parties signed on March 1, 2011 contain any such provision or waiver language. What it does contain is a “Release of all Claims” “stemming from or in any way related to Employee’s *employment* by District or termination of the *employment* relationship.” CP 136-137. The release had nothing to do with Dr. Shibley’s provisional privileges or waiving his right to complain about false reports submitted to the NPDB. Finally, the release language in Article 2, Section 2.c and 2.d of the Medical Staff Bylaws (Immunity from Liability) does not insulate Snoqualmie Valley Hospital from liability because all the actions the hospital took against Dr. Shibley were either invalid or vitiated by fraud; because the release language in the bylaws certainly does not release the hospital from prospective fraud or essentially license the hospital to commit fraud; and because the release is unconscionable and against public policy.

- I. The Court erred by failing to determine whether Dr. Witkop's termination of Dr. Shibley's employment constituted retaliation in violation of his constitutionally protected right of free speech.

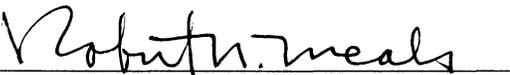
Dr. Shibley was a public employee who spoke out against what he contended was poor quality care provided to patient R.B. at Snoqualmie Valley Hospital by Dr. Pisani on February 16, 2011. Dr. Witkop fired Dr. Shibley the next afternoon, on February 17, 2011. Dr. Shibley contended that she fired him in part because he criticized Dr. Pisani's care of patient R.B. when they got into a heated argument in the morning on February 16 and shortly after that, Dr. Pisani decided to resign. A public employee can prevail on a First Amendment free speech retaliation claim if he or she can show that the speech was constitutionally protected, the employee suffered a deprivation likely to deter free speech and the employer's action was at least partly motivated by the speech. *Johnson v. County of Cook*, Case Nos. 08 C 2139 and 08 C 3648, (N.D. Illinois 2012). Here, Dr. Shibley spoke out on a matter of public interest (quality of health care) that is constitutionally protected, suffered a deprivation (his employment was terminated almost immediately after he argued with Dr. Pisani and Dr. Pisani threatened to quit), and under the circumstances, a reasonable jury could find that his employer's action was at least in part motivated by his exercise of free speech.

V. CONCLUSION

A reasonable jury could find that Dr. Shibley examined patient S.T. on February 9, 2011. A reasonable jury could also find that he did not falsify patient S.T's history and physical report. A reasonable jury could also find that Dr. Shibley did not have any privileges for respondents to act against on March 8, 2011. A reasonable jury could find that Snoqualmie Valley Hospital acted fraudulently against Dr. Shibley and defamed his professional reputation. Accordingly, this court should (i) reverse the order granting summary judgment and (ii) remand the case to superior court for trial on all genuine issues of material fact regarding the respondents' actions regarding Dr. Shibley's provisional medical staff privileges, and damages.

TODAY'S DATE is May 8, 2015.

Respectfully submitted,


Robert N. Meals, WSBA 19990
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury of the laws of the State of Washington, that the following is true and correct: That on Friday, May 8, 2015, I re-served a copy of Appellant's Brief by regular U.S. Mail on the following counsel for respondents:

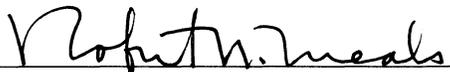
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