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Supreme Court No. 100682-9
Court of Appeals No. 81936-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN HASSAPIS, M.D.,

Appellant/Petitioner,

v.

WHIDBEY ISLAND PUBLIC HEALTH DISTRICT d/b/a
WHIDBEYHEALTH MEDICAL CENTER,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Dr. John Hassapis is a former employed surgeon of Respondent Whidbey Island Public Hospital District d/b/a WhidbeyHealth Medical Center ("WhidbeyHealth"). Dr. Hassapis seeks review of Division One's decision affirming Island County Superior Court's summary dismissal of his contract and statutory wage claims. The Court should deny review. Division One's decision presents no conflict with the Rules of Appellate Procedure (RAP), this Court's authority, or any other published decision or court rule. *See* RAP 13.4(b). Likewise, it presents no significant question of law or public interest. *Id.* Despite Dr. Hassapis' failure to comply with RAP 9.12, Division One nevertheless considered (and correctly rejected) arguments raised for the first time on appeal. It also properly relied on the actual evidence and argument considered by the trial court at summary judgment. There is no reason for further review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does Division One's determination that Dr. Hassapis raised new arguments on appeal that were not brought to the attention of the trial court conflict with any decision of this Court or other published appellate decision or present a significant question of law or public interest?

2. Does Division One's substantive rejection of Dr. Hassapis' arguments, including those raised for the first time on appeal (or raised for the first time in his appellate reply brief), conflict with any decision of this Court or published appellate decision or present a significant question of law or public interest?

III. COUNTERSTATEMENT OF THE FACTS

A. The Physician Employment Agreement

On June 11, 2014, Dr. Hassapis and WhidbeyHealth entered into a Physician Employment Agreement ("Agreement"). CP 59-72. The initial term was three years (from July 16, 2014, to July 15, 2017), with automatic one-year

renewals afterward. CP 59. The Agreement defined Base Compensation as:

> 35% of Gross Charges for services personally performed by the Physician. The first through third year guarantee is $351,575 per year. ... If 35% of Gross Charges exceeds $351,575 during the twelve months of the first through third year, the difference between 35% of Gross Charges and $351,575 will be paid to the Physician before the end of the first quarter of the following year. Beginning year 4, compensation will be equal to 35% of Gross Charges.

CP 68. Gross Charges included "all monies charged for physician professional services rendered by the Physician at the Physician Offices and at the Hospital. Revenues for 'designated health services,' as defined in 42 U.S.C. § 1395nn, shall not be included in the calculation of Physician's Charges." *Id.* The Agreement included a compensation ceiling. *Id.* In sum, Dr. Hassapis' Base Compensation was 35 percent of Gross Charges, with a minimum guarantee of $351,575, up to the ceiling. After completion of the third contract year, there would be no minimum guarantee.

B. Dr. Hassapis' Claims

On November 1, 2019, WhidbeyHealth terminated Dr. Hassapis' employment. He subsequently filed a lawsuit, alleging that WhidbeyHealth failed to pay his actual Base Compensation. CP 380. Although WhidbeyHealth paid the guaranteed minimum each year, he alleged 35 percent of actual Gross Charges exceeded that amount. *Id.* He raised breach of contract and statutory wage claims. CP 381-82.

C. WhidbeyHealth's Discovery Responses and Counsel's Emails Concerning Dr. Hassapis' Gross Charges

In March 2020, WhidbeyHealth provided counsel the following information concerning Gross Charges:

> [The] following are the total "Gross Charges" for 2014 through 2019 … along with the calculation for Base Compensation. … Although these numbers are preliminary and subject to change upon further investigation, it is unlikely that any such change would be material to Defendant's responses herein.
>
> 2014: $319,885.00 x .35 = $111,959.75
> 2015: $939,408.11 x .35 = $328,792.84
> 2016: $755,313.34 x .35 = $264,359.67
> 2017: $664,522.60 x .35 = $232,582.91
> 2018: $787,551.40 x .35 = $275,642.99

2019: \$762,647.10 x .35 = \$266,926.49

> The "Gross Numbers" for 2017 through 2019 were pulled from Centricity, the electronic health record system that is currently used and accessible by WhidbeyHealth. Prior to Centricity … Defendant used Healthwind. Thus, the "Gross Charges" listed above for 2014 - 2017 are preliminary, as some of the data is from the Healthwind system. Defendant currently has limited access to Healthwind and will supplement this response once it has been able to access the system to verify the numbers for 2014 – 2017. Please also see the documents produced contemporaneously herewith as WHIDBEY 000082-000692 relating to 2017 through 2019, and documents for 2014 through 2016 (and part of 2017) will be supplemented if and when they can.

CP 171-72.

On June 9, 2020, WhidbeyHealth produced Healthwind reports, which showed \$144,732.88 of additional charges for 2017. CP 87-91, 346. Counsel explained that to calculate Gross Charges for 2017, the number from the Centricity report (\$664,522.60) needed to be added to the number from the Healthwind report (\$144,732.88) for a total of \$809,255.48. CP 346. The following month, WhidbeyHealth provided

supplemental discovery responses referencing the Healthwind report. CP 330, 337, 351.

D. WhidbeyHealth's Motion for Summary Judgment

On June 26, 2020, counsel for WhidbeyHealth proposed a summary judgment hearing date. CP 340. Dr. Hassapis' counsel requested pushing the hearing out two weeks. CP 342. On August 4, 2020, WhidbeyHealth filed its Motion for Summary Judgment. By that point, Dr. Hassapis had been in possession of the Healthwind reports for almost two months. CP 39, 346. From June 30, 2020, when WhidbeyHealth noted its motion, and the September 1, 2020 hearing, Dr. Hassapis engaged in no discovery whatsoever, including failing to propound any additional written discovery or request any depositions. CP 36, 311.

In its motion, WhidbeyHealth argued that Dr. Hassapis was not entitled to a production bonus, based on the Centricity and Healthwind reports. CP 46-49. WhidbeyHealth also relied on a separate August 4, 2020 report that separated Dr. Hassapis'

Gross Charges from the end of his third contract year, July 15, 2017, to the end of the 2017 calendar year (that period of Gross Charges equaled $373,218.90). CP 56, 95-105. The evidence before the trial court therefore showed that during Dr. Hassapis' first three contract years his Gross Charges totaled $2,450,643.03. CP 80-105, 359. Thirty-five percent of that figure is $857,725.06—significantly less than the $1,069,804.09 he was paid in total over the first three years of his contract. CP 47. Similarly, from the start of the fourth year of the Agreement (July 16, 2017) until termination on November 1, 2019, Gross Charges totaled $1,923,417.40, of which 35 percent totals $673,196.09. *Id.* WhidbeyHealth paid Dr. Hassapis $920,200.73 during that period, substantially exceeding 35 percent of Gross Charges. *Id.*

WhidbeyHealth also argued that Dr. Hassapis appeared to be improperly including "designated health services" in his calculation of Gross Charges, which could not be included because such inclusion would violate state and federal laws such

as 42 U.S.C. § 1320a-7b(b) (the Anti-Kickback Statute) and 42 U.S.C. § 1395nn (the Stark Law). CP 48, 232-36.

In response, Dr. Hassapis argued the Agreement was unconscionable, and that "Gross Charges" was ambiguous, not supported by extrinsic evidence, and should not exclude "designated health services." CP 141-62. He also contended that WhidbeyHealth's reports were missing three surgeries in 2014 and 25 colonoscopies in 2019. CP 188. However, WhidbeyHealth's Director of Finance Jennifer Reed testified that even if those procedures were included, Dr. Hassapis' revised Gross Charges total would not come remotely close to the amount of professional charges necessary to earn a production bonus. CP 359-60.

Dr. Hassapis also submitted a 2019 surgical center report listing $642,413.00 for inpatient surgeries and $3,014,746.00 for outpatient surgeries, but he admitted that he did not understand the significance of the report or how the numbers were calculated. CP 187, 219. Ms. Reed clarified that the numbers

contained in that 2019 report reflect facility charges rather than Dr. Hassapis' personal services. CP 219, 359. WhidbeyHealth's counsel had previously explained this fact months before. CP 347.

Lastly, Dr. Hassapis argued that he was entitled to a CR 56(f) continuance. CP 142, 153. He did not, however, submit a declaration in support of his request, offer a good reason for delay in obtaining any necessary discovery, state what evidence would be gained through additional discovery, or demonstrate how additional discovery would create a genuine issue of material fact. CP 141-62, VRP 10-15.

At the hearing, Dr. Hassapis abandoned unconscionability; he maintained that the 2019 report showed that he had $3 million of Gross Charges; and he contended that WhidbeyHealth's reports were incorrect. VRP 10-15. But he never argued that the August 4, 2020 report showing charges between July 16 and December 31, 2017 constituted *additional* charges. *See* CP 141-62, VRP 10-15. That argument likely was

not made due to the cooperative and transparent communications between counsel; Dr. Hassapis' trial counsel knew that the August 4, 2020 report did not constitute additional charges, so he did not make the disingenuous argument appellate counsel has tried to advance. The trial court granted the motion, determining that "Gross Charges" was unambiguous, and that the evidence showed Dr. Hassapis was paid more than the contractual base wage, even including purported missing procedures. VRP 16-20; CP 362-64. The trial court determined there was no genuine issue of material fact and also denied the request for a continuance. VRP 20.

E. Division One's Decision Affirming the Trial Court

Dr. Hassapis appealed the trial court's grant of summary judgment and denial of the CR 56(f) request. Dr. Hassapis argued that the August 4, 2020 report submitted in support of summary judgment reflected "new data" showing *additional* Gross Charges for 2017, which showed a breach of contract as a matter of law that would entitle him to additional income. In its

Response, WhidbeyHealth pointed out that Dr. Hassapis had never raised this argument to the trial court, and that the issue therefore was not preserved for appeal per RAP 9.12. WhidbeyHealth also pointed out that Dr. Hassapis' new argument misconstrued the report and the actual evidence, which established that he had been overpaid during his employment. In his Reply, Dr. Hassapis continued to misstate the import of the August 4, 2020 report, and he argued that declarations WhidbeyHealth had submitted in support of summary judgment were allegedly inconsistent with that report. The reply also argued – for the first time – that the separate 2019 report showing facility charges supported reversal.

On January 24, 2022, Division One affirmed the trial court in an unpublished decision (*John Hassapis v. Whidbey Public Hospital District*, No. 81936-4-I, Jan. 24, 2022). *See* Appendix

at 1-11.[1] Division One noted that Dr. Hassapis' argument related to the August 4, 2020 report was neither pleaded nor argued to the trial court, and thus was not properly at issue on appeal. *Id.* at 7-8. Even if it had been properly raised, the Court determined that Dr. Hassapis misread the August 4th report as listing out additional charges instead of a subset of charges, and it rejected the 2017 underpayment argument. *Id.* at 8. Next, the Court determined that Dr. Hassapis' argument, that the 2019 surgical center report showed individual production totals, again was not properly before the Court because it was raised for the first time in his reply brief. *Id.* at 9. Even if it were properly raised, the Court held that the 2019 report did not create an issue of material fact, as there was no actual evidence to support Dr. Hassapis' argued interpretation. *Id.* at 9-10. Next, the Court affirmed the trial court's denial of Dr. Hassapis' CR 56(f) request. *Id.* at 10-

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[1] Petitioner's Appendix includes materials beyond the items listed in RAP 13.4(b)(9). Those materials include handwritten notes by appellate counsel not before the trial court.

11. Finally, the Court rejected Dr. Hassapis' argument regarding error purportedly by the trial court in supposedly interpreting the Agreement in two three-year periods instead of an annual basis, a new argument again raised for the first time in the reply brief. *Id.* at 11.

F. Dr. Hassapis' Petition for Review

Dr. Hassapis' Petition for Review ("Petition") continues to claim that the August 4, 2020 report is evidence that he was "shorted over $62,000 for at least one of the years of his employment." Petition at 4. He also points to his purported "plain, common-sense analysis" of the 2019 surgical center report, which he argues should overcome the actual evidence before the trial court. *Id.* at 5. Dr. Hassapis argues review is warranted because Division One incorrectly failed to overturn the trial court and misapplied RAP 9.12.

IV. ARGUMENT

The Court should deny the Petition. Dr. Hassapis fails to articulate a valid reason why the trial court's order of summary

judgment was wrongly decided or why Division One's decision ("Decision") affirming same meets any of the criteria of RAP 13.4(b). The Decision does not conflict with any other published authority or court rule, and it presents no significant question of law or public interest. *Id.* Despite Dr. Hassapis' claim that Division One improperly applied RAP 9.12, it considered and rejected arguments raised for the first time on appeal. Those arguments simply have no merit and no evidentiary basis.

A. Dr. Hassapis' misrepresentation of the August 4, 2020 report is not a sufficient basis for this Court's review.

With respect to RAP 13.4(b), in support of this Court's potential review (Section IV of his brief), Dr. Hassapis first argues that Division One's approach conflicts with various published opinions and federal authority regarding the moving party's burden on summary judgment. Petition at 11-15, 23-24. In support of this assertion, Dr. Hassapis misrepresents the August 4, 2020 report for the proposition that he was "shorted over $62,000 for 2017." Petition at 11. Not only was this

argument never brought to the attention of the trial court, there is no evidentiary support for it. Instead, this argument is unsupported and directly counter to the actual evidence. *See supra* at 3-4.

As Division One properly recognized, WhidbeyHealth submitted the August 4, 2020 report to the trial court to establish by subtraction Dr. Hassapis' Gross Charges for January 1, 2017 through July 15, 2017, the end of the third contract year of his Agreement. WhidbeyHealth submitted evidence of Gross Charges calculations to the trial court based on contract year—specifically, $2,450,643.03 for the first three contract years (July 16, 2014 to July 15, 2017) and $1,923,417.40 from the beginning of the fourth contract year through the end of Dr. Hassapis' employment (July 16, 2017, to November 1, 2019). CP 47, 55-57, 80-113, 236-37, 359-60.

The August 4, 2020 report separated out the Gross Charges for July 16, 2017 to December 31, 2017 ($373,218.90) from the total Gross Charges for 2017 ($144,732.88 +

$664,522.60 = $809,255.48). *See supra* at 3-4. By subtracting $373,218.90 from $809,255.48, the remainder is $436,036.58—the amount of Gross Charges for January 1, 2017, through July 15, 2017—the last day of the third contract year. CP 59. WhidbeyHealth's Director of Finance, Jennifer Reed, who reviewed the reports in support of WhidbeyHealth's motion, testified that Dr. Hassapis' Gross Charges for the first three years of the Agreement (July 16, 2014, through July 15, 2017) therefore totaled $2,450,643.03. CP 359. Thirty-five percent of that figure is less than what Dr. Hassapis received in compensation during those three contract years. *See supra* at 5; Decision at 8. Indeed, during the first three contract years, WhidbeyHealth paid Dr. Hassapis a total of $1,069,804.09, substantially exceeding 35 percent of his Gross Charges during those years. CP 133-37.

Therefore, the August 4, 2020 report does not and cannot conceivably show that Dr. Hassapis was underpaid in 2017 or any other contract or calendar year. It simply shows Dr.

Hassapis' Gross Charges for the latter part of calendar year 2017 in order to subtract out that total to calculate his Gross Charges for the remainder of the third contract year from January 1, 2017 to July 15, 2017, which amount was *already incorporated* into earlier discovery responses and reports listing Gross Charges provided to his counsel. *See supra* at 3-4; Decision at 8. There is no evidentiary or legal basis to conclude that the August 4, 2020 report constitutes evidence of lost income, missing or additional Gross Charges, or a genuine issue of material fact regarding same.

Other than blatantly misconstruing the August 4, 2020 report, Dr. Hassapis points to no other piece of evidence that shows how Division One's decision conflicts with published authority on the moving party's burden on summary judgment. Mere allegations or conclusory statements of fact, unsupported by evidence, do not sufficiently establish a genuine issue. *Baldwin v. Sisters of Providence in Washington*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

The Court should deny this proposed basis for Review.

B. Despite citing RAP 9.12 and 10.3, Division One still considered and rejected arguments raised for the first time on appeal.

Dr. Hassapis' next proposed basis for review under RAP 13.4(b) is a claim that Division One misapplied RAP 9.12. Petition at 15-22. Dr. Hassapis ignores the fact that, despite citing RAP 9.12 with respect to the August 4, 2020 report, and citing RAP 10.3 with respect to the 2019 surgery center analysis, Division One nevertheless still considered and rejected his arguments on those issues. Thus, even if there were some conceivable conflict between various appellate and civil rules, which there is not, Dr. Hassapis' argument as to the proper scope of appellate review is moot.

RAP 9.12 bars new arguments raised for the first time on appeal. RAP 10.3(c) generally limits arguments in reply briefs to "a response to the issues in the brief to which the reply brief is directed." *Id.* As Division One noted, Dr. Hassapis failed "to call the trial court's attention" to the August 4, 2020 report. *See*

Decision at 7-8. The Petition offers nothing to show otherwise. Thus, RAP 9.12 plainly applies as he never raised that argument to the attention of the trial court.

Dr. Hassapis claims that Division One "sharply restricted appellate review beyond what the terms of RAP 9.12 require, and [its application] is contrary to RAP 1.2(a) and the text and spirit of Civil Rules 1 and 56." Petition at 17. Dr. Hassapis makes general assertions that Division One failed to perform a de novo review or that RAP 9.12 and *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn.App.2d 765, 425 P.3d 560 (2018) conflict with RAP 1.2(a) and other civil rules. But he provides no substantive explanation of his argument; he cannot show how or why *Johnson* is possibly incorrect; and he ignores multiple other published cases other than *Johnson* that express the similar rule against offering new arguments on appeal, whether in the summary judgment context or otherwise. *See, e.g.*, *Silverhawk, LLC v. KeyBank Nat. Ass'n,* 165 Wn. App. 258, 266, 268 P.3d 958 (2011) (where plaintiff did not present contract analysis to

trial court, appellate court would not consider it); *Sourakli v. Kyriakos,* 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied,* 165 Wn.2d 1017, 199 P.3d 411 (2009) (finding that argument was not preserved for appeal where, upon reading the motion, neither the trial court nor the defendants could reasonably be expected to perceive that plaintiff intended to pursue the argument).

This approach by Washington appellate courts to generally avoid considering new issues or new arguments not offered by a litigant to the trial court at the appropriate time (such as objecting to jury instructions) has been the law for <u>decades</u>. *See, e.g., Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). The same goes for de novo review of summary judgment decisions. *See, e.g., Almy v. Kvamme*, 63 Wn.2d 326, 329, 387 P.2d 372 (1963) (issue not raised at hearing on motion for summary judgment could not be considered for first time on appeal).

There is no difference between RAP 9.12's use of the word "issue" and the *Johnson* court's use of "argument" with respect

to legal, factual, or evidentiary assertions never offered to the trial court in opposition to a summary judgment. There is no daylight between the Rules of Appellate Procedure and *Johnson*, and certainly not with respect to the Decision. Whether called issues or arguments, whatever is not offered to the trial court for its consideration does not constitute a proper subject of appellate review.

Dr. Hassapis also claimed at oral argument, for the first time, a separate alleged error by the trial court in not applying an annual reconciliation method when interpreting the Agreement. Division One noted that, at best, Dr. Hassapis raised this issue for the first time in his reply brief. *See* Petition at 11. As a result, Division One decided not to review the issue, citing RAP 10.3(c) and *Bergerson v. Zubano*, 6 Wn.App.2d 912, 423 P.3d 850 (2018). *Id.* In his Petition, Dr. Hassapis appears to refer to this separate issue in one sentence. *See* Petition at 21-22. Dr. Hassapis has not offered this Court any reason to review that aspect of the Decision. "This court does not consider issues

raised for the first time in a reply brief." *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). Even if Division One had considered that argument, it has no merit. There was no *evidence* presented to the trial court that Dr. Hassapis' Gross Charges in any calendar or contract year were sufficient to justify more compensation under the Agreement, regardless of the reconciliation timeframe. As a result, the trial court correctly ruled that there was no genuine issue of material fact.

The Court should also deny this proposed basis for review.

C. The denial of an unsupported CR 56(f) request is not a miscarriage of justice.

The Petition briefly refers to the Decision's "analysis" affirming that the trial court did not abuse its discretion in denying his CR 56(f) request, as "an example of a return to miscarriage of justice by overlaying archaic procedural requirements…." Petition at 22; *See* Decision at 10-11. The trial court's grant or denial of a motion for a CR 56(f) continuance will not be disturbed absent a showing of manifest abuse of

discretion. *Turner v. Kohler,* 54 Wn. App. 688, 693, 775 P.2d 474 (1989). Denial is proper when "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Id*. As the Decision notes, Dr. Hassapis failed to satisfy any of the prerequisites justifying a CR 56(f) continuance. There is no abuse of discretion by the trial court and Dr. Hassapis presents no substantive reason or otherwise under RAP 13.4(b) for this Court to review.

D. <u>WhidbeyHealth Requests Attorney Fees in Responding to Dr. Hassapis' Petition</u>

Pursuant to RAP 18.1(j), in the event the Court denies Dr. Hassapis' Petition, WhidbeyHealth requests the Court award its reasonable attorney fees and expenses related to the preparation and filing of this Response. If awarded, counsel will submit a timely affidavit per RAP 18.1.

V. CONCLUSION

For the foregoing reasons, the Court should deny the Petition and award WhidbeyHealth its reasonable attorney fees and expenses.

I certify that this Answer contains 3,844 words, in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 25th day of March, 2022.

MULLIN, ALLEN & STEINER, PLLC

/s/ Justin Steiner
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Attorneys for Respondent Whidbey Island Public Hospital District d/b/a/ WhidbeyHealth Medical Center

CERTIFICATE OF SERVICE

I hereby certify that I electronically served a true and correct copy of the foregoing upon the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of March 2022.

MULLIN, ALLEN & STEINER, PLLC

/s/Emily Boehmer
Emily Boehmer
Paralegal

MULLIN ALLEN AND STEINER PLLC

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